SUPREME COURT, U.S.
FILED

No. 95 166 JUL 26 1995

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In The

Supreme Court of the United States

October Term, 1995

NATIONAL FIDELITY LIFE INSURANCE COMPANY,

Petitioner,

vs.

GEORGE W. CHADIMA, TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; SWISHER TRUST & SAVINGS BANK, AS TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; GEORGE W. CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA; LILLIAN ESTHER CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA,

Respondents,

and

STATE OF IOWA, CIVIL REPARATIONS TRUST FUND,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Iowa Supreme Court has consistently held that an insurance company has the right to debate a claim that is "fairly debatable" without being subject to bad faith tort claims, and that whether a claim is fairly debatable as to a matter of fact or law is appropriately decided by the court as a matter of law. The Court of Appeals for the Eighth Circuit interpreted this state law as merely giving the trial court the *opportunity* to decide the "fairly debatable" question. The question presented is whether an "unreasonable" or "clearly erroneous" application of well established state law violates the Erie Doctrine and calls for the Supreme Court's supervision.

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STATEMENT OF JURISDICTION

The District Court entered its judgement on May 25, 1994. The Court of Appeals entered its judgement on April 26, 1995. The Petition for Rehearing En Banc was denied on June 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court's jurisdiction was raised under 28 U.S.C. § 1332 based on the parties' diversity of citizenship and the amount in controversy.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States extends the judicial powers of the Supreme Court to all cases between citizens of different states. 28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This petition raises fundamental questions concerning the Erie Doctrine and the obligation of a Court of Appeals to apply state substantive law in a diversity action.

A. Statement of the Facts

On January 21, 1986, National Fidelity ("Company") issued a declining death benefit policy to George Milton Chadima ("Chadima"). In April of 1989, Chadima requested that the policy be converted into a fixed death benefit. Chadima was informed that he could convert the declining death benefit policy into a $90,000 fixed death benefit policy by forwarding his current policy along with a change of policy form to the Company. On July 11, 1989, Chadima forwarded the appropriate change form to the Company.

The insurance policy provided that a change in the face amount of the policy would be effected upon receipt of the request for change by National Fidelity. Whereas, the request for change form stated that the requested change would not take effect until approved in writing by the Company. There is no dispute that the forms were contradictory.

Chadima died on October 26, 1989, before the Company had notified him in writing that the policy had been changed. At that time, the declining-benefit policy had a value of $134,973.20. On November 29, 1989, Chadima's estate filed a claim for benefits. The Company reviewed the claim and initially concluded that the change had been effected. Company records indicated that a new pay-out sheet had been generated and the policy was not found. It was presumed that the policy was returned to Chadima. The Company tendered a check in the amount of $91,423.97. Chadima's estate then demanded payment under the original policy. The estate's attorney informed the Company that the policy had not been reissued. Recognizing that potential litigation existed, National Fidelity sent the estate an additional check for $46,072.89 on February 22, 1990 (within three months after the initial claim).

B. Course of Proceedings

Chadima's estate filed this action of first-party bad faith, breach of contract, and fraud in Iowa state court. National Fidelity timely removed the action to federal court based on diversity of citizenship pursuant to 28 U.S.C. § 1332. Both parties consented to proceed before a magistrate judge pursuant to 28 U.S.C. § 636(c).

At the close of all evidence, National Fidelity moved for a directed verdict on all claims. The magistrate judge concluded that Iowa law required him to decide as a matter of law whether National Fidelity had a reasonable basis for denying Chadima's claim. *Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1431 (S.D. Iowa 1994). The magistrate reserved final judgement until post-trial motions, however, and submitted the question of whether National Fidelity had a reasonable basis for denying the claim to the jury.

The jury returned a verdict in Chadima's favor, awarding compensatory damages of $34,029 and punitive damages of $100,000 on the first-party bad faith claim. On post trial motions, the magistrate judge relying on *Wetherbee v. Economy Fire & Casualty Company*, 508 N.W. 2d 657, 661 (Iowa 1993), held that

> . . . the court must decide as a matter of law whether the underlying claim was fairly debatable and that it is impermissible to submit that question to the jury. The court finds that the trial evidence supports National Fidelity's position that Chadima's claim was fairly debatable and, therefore, grants National Fidelity's Rule 50 motion. *Chadima*, 848 F.Supp. at 1433.

Chadima's estate filed a timely appeal with the Court of Appeals for the Eighth Circuit on the first-party bad faith claim. The Court of Appeals reviewed the magistrate's interpretation of Iowa law, and reversed the magistrate's decision. The court held that *Wetherbee* could be read as giving the "trial court the opportunity to decide as a matter of law in the appropriate circumstances whether the insurer had a reasonable basis for denying the claim, but not mandating the court to do so." *See Chadima*, 55 F.3d at 349. The Court went on to say that the cases cited by Company, *Wetherbee* and its predecessors, do *not* require the court to first decide as a matter of law whether a claim is fairly debatable. *Id.* The Court of Appeals reinstated the jury verdict and damage award.

The Court of Appeals denied National Fidelity's Petition for Rehearing En Banc on June 14, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DID NOT FOLLOW IOWA LAW PROVIDING THAT WHETHER A CLAIM IS "FAIRLY DEBATABLE", IN ANY GIVEN CIRCUMSTANCE, CONSTITUTES A QUESTION OF LAW FOR THE TRIAL COURT.

The Iowa Supreme Court first recognized the intentional tort of first-party bad faith in *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988). To prove that the insurer acted in bad faith in denying the claim, the insured must show (1) the absence of a reasonable basis for denying their claim under the policy, *Id.*, at 794; and (2) that the insurer denied the claim knowing or having reason to know that its denial was without a reasonable basis. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990). A

reasonable basis to deny a claim exists when the claim is fairly debatable. *Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 253 (Iowa 1991).

The Supreme Court of Iowa has established that whether a claim is fairly debatable **in any given situation** is appropriately decided by the court as a matter of law. *Wetherbee v. Economy Fire & Cas. Co.*, 508 N.W.2d 657 (Iowa 1993) (emphasis added). After the Court of Appeal's decision in this case was filed, the Iowa Supreme Court reiterated its holding that "where an objectively reasonable basis for denial of a claim actually exists, the insurer cannot be held liable for bad faith as a matter of law." *Morgan v. American Family Mutual Insurance Company*, 1995 WL 374784 (Iowa 1995) (holding that the bad faith claim should not have been submitted to the jury). *Wetherbee* and *Morgan* confirm past Iowa cases holding that the preliminary determination of reasonableness in a bad-faith claim must be made by the court as a matter of law. *See also, Reuter*, 469 N.W.2d at 254; *Central Life Ins. v. Aetna Cas. & Sur.*, 466 N.W.2d 257, 263 (Iowa 1991); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W.2d 857, 862 (Iowa 1991); *Kiner*, 463 N.W.2d at 12. The Iowa Supreme Court has *never* held that the fairly debatable as a matter of law test may be applied in a discretionary manner by the trial court. The threshold determination must appropriately be made as a matter of law "in any given circumstance" by the trial court. *Wetherbee*, 508 N.W.2d at 661. *See also, Morgan*, 1995 WL 374784.

Following the "plain and clear meaning" of the Iowa Supreme Court in *Wetherbee*, Magistrate Judge Bennett determined as a matter of law that the claim was fairly debatable and that it was impermissible to submit the bad faith claim to the jury. *Chadima*, 848 F. Supp. at 1433. The Court of Appeals applying a *de novo* review ignored the "clear and plain meaning" of the Iowa common law and held that the district court had the

opportunity to decide the "fairly debatable" issue as a matter of law in the appropriate situations, but that it was not required to do so. 55 F.3d at 349. The Eighth Circuit's failure to follow established Iowa law constitutes a significant departure from the usual judicial proceedings requiring the application of substantive state law in a diversity action.

II.

THE COURT'S *SALVE REGINA COLLEGE V. RUSSELL* DECISION CREATES COMPELLING REASONS FOR CERTIORARI TO BE GRANTED WHEN APPELLATE COURTS CREATE NEW STATE LAW WHILE MAKING A *DE NOVO* REVIEW OF DISTRICT COURT OPINIONS.

Prior to 1980, the Supreme Court Rules explicitly allowed certiorari to be granted when a Court of Appeals decided an important state question in a way that conflicted with applicable state law. *See* Rule 19(a), (b) of the Revised Rules of 1970. When the Rules were changed in 1980, this Court was of the opinion that federal district courts and courts of appeal were "better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (citing *Bishop v. Wood*, 426 U.S. 341 (1976)). The Eighth Circuit Court of Appeals applied a logical extension of the Court's *Brockett* analysis in *Norton v. St. Paul Fire & Marine Ins. Co.*, 902 F.2d 1355, 1357 (8th Cir. 1990) when it said: "In general, we accord substantial deference to the district court's interpretation of the law of the state in which it sits." *See also, Dennis v. Rhode Island Hospital Trust Nat'l Bank*, 744 F.2d 893, 896 (1st Cir. 1984) ("... we are reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices"). Prior to the *Salve Regina College* case, the Supreme Court would rarely second guess appellate courts presumably

because it was a second step removed from the locale and lacked familiarity with each state's laws.

The deference afforded to District Court interpretations of state law, and the corresponding reasons why appellate court decisions typically would not be reviewed by the Supreme Court, ended with *Salve Regina College v. Russell*, 499 U.S. 225 (1991). In *Salve Regina College*, a majority of this Court held that appellate courts should review determinations of state law made by federal district courts on a *de novo* basis. The majority believed that appellate court deference allowed for "divergent development of state law among the federal trial courts even within a single State." *Id.* at 234. By allowing *de novo* review the court felt that the twin aims of the Erie doctrine, "discouraging forum shopping and avoiding the inequitable administration of the laws," would be furthered. *Id.* Presumably, appellate court *de novo* review would create consistency among the federal districts within a state.

Unfortunately, *Salve Regina College* did not explain what avenue a litigant, such as National Fidelity, may follow when an appellate court departs in the first instance from established state common law. The magistrate judge in a detailed eighteen page decision tracked the history of first party bad faith in Iowa from its inception to the present. He found as a matter of law from the trial evidence that *objectively* reasonable grounds existed to deny the claim. 848 F. Supp at 1432. The panel of appellate court judges, none of whom were appointed from Iowa, then created a discretionary bad faith standard by applying the *de novo* review. By going where no Iowa court had gone before, a dichotomy of laws has been created. The federal interpretation provides that a district court has the "opportunity" to, but need not, decide as a matter of law if a claim is fairly debatable.[1] Iowa law holds that

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1. The decision below ignores the fact that the District Court did exercise its discretion to decide if Chadima's claim was fairly debatable. (Cont'd)

"where an objectively reasonable basis for denial of a claim actually exists, the insurer *cannot* be held liable for bad faith as a matter of law." *Morgan*, 1995 WL 374784 (Iowa 1995) (emphasis added). The dichotomy of laws created by the decision below encourages forum shopping and creates the inequitable administration of Iowa law, the very abuses that *Salve Regina College* attempted to prevent.

If the Supreme Court will not mandate appellate court deference, as Justices Rehnquist, White and Stevens advocate in their dissent in *Salve Regina College*, then the Court must accept certiorari when an appellate court enters an unreasonable or erroneous decision. Without allowing certiorari, the aim of preserving equity in the administration of state laws pursuant to the Erie Doctrine will be offended as appellate courts become empowered with the ability to create a dichotomy of laws.

If unwilling to grant certiorari, this Court should utilize the process of certifying the issue at hand to the Iowa Supreme Court, a process recommended in *Salve Regina College*, 499 U.S. at 237, n. 4. Rather than guessing whether *Wetherbee* meant what it said, the court below could have certified the question as Chadima had requested. *See* Iowa Rule of Appellate Procedure 451. Certification, even now, would promote the building of a cooperative judicial federalism by preventing a dichotomy of laws. *See Virginia v. American Booksellers Ass'n., Inc.*, 484 U.S. 383 (1988); *Lehman Bros. v. Schein*, 416 U.S. 386, 390 n. 6 (1974). The question for certification would be "whether the District Court must determine as a matter of law if objectively reasonable grounds exist to establish that a claim is fairly debatable before submitting the bad faith question to a jury?"

(Cont'd)
Applying the Eighth Circuit standard, the magistrate judge below exercised his "opportunity" to determine if objectively reasonable explanations existed to question the bad faith claim. He concluded from the trial evidence that the claim was fairly debatable.

III.

THE QUESTION PRESENTED WILL HAVE A MAJOR IMPACT ON THE INSURANCE INDUSTRY, INSURANCE CONSUMERS, AND THE JUDICIAL PROCESS.

When insurance companies are penalized for internally debating claims, as was the case here, the public suffers by paying increased insurance rates. Houser, *Good Faith as a Matter of Law: The Insurance Company's Right to Be Wrong*, 27 Tort & Ins. L.J. at 666 (1992). The cost to the insurance industry and insurance buying public has been estimated to be in the hundred million dollar range. *Id.; see also,* Barker & Barnes, *The Standard of First Party Bad Faith*, 4 No. 6 Coverage at 18 n. 15 (in the wake of the sweeping expansion of bad faith liability in the 1970's and 1980's, California experienced a crisis of affordability and availability of insurance). How insurance companies will be judged when evaluating claims constitutes an issue of exceptional importance.

The decision below encourages litigants to spin the bad faith wheel of fortune. In the life insurance context, billion dollar companies will have their review of claims second-guessed by jurors subjected to the emotions of litigants who have lost loved ones. When insurance companies cannot internally review a claim for less than three months without penalty, as was the case here, questionable claims will be paid to avoid litigation. Insurance companies must have the right to be wrong.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternately, the Iowa Supreme Court should be presented with the certified question.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED JUNE 14, 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2056/2156/2157SID

George W. Chadima, etc., et al.,

Appellants,

vs.

National Fidelity Life Insurance Company, et al.,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 14, 1995

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED APRIL 26, 1995

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-2056
No. 94-2156
No. 94-2157

George W. Chadima, Trustee of the George Milton Chadima and Lillian Esther Chadima Trust; Swisher Trust & Savings Bank, as Trustee of the George Milton Chadima and Lillian Esther Chadima Trust; George W. Chadima, Executor of Estate of George Milton Chadima; Lillian Esther Chadima, Executor of Estate of George Milton Chadima,

Appellants/Cross-Appellees,

v.

National Fidelity Life Insurance Company,

Appellee/Cross-Appellant,

State of Iowa, Civil Reparations Trust Fund,

Intervenor-Appellee/Cross-Appellant.

Appeals from the United States District Court
for the Southern District of Iowa

Appendix B

Submitted: December 14, 1994

Filed: April 26, 1995

Before MCMILLIAN, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and SHAW,* District Judge.

JOHN R. GIBSON, Senior Circuit Judge.

This diversity case presents the question of whether a judge or jury should decide whether an insurer had a reasonable basis for denying a claim in a first-party bad faith action. Cases from the Iowa Supreme Court go both directions. The magistrate judge granted the insurer's post-trial motion for judgment notwithstanding the verdict, concluding that under Iowa law, whether the insurer's position is fairly debatable is a question of law. Because there was substantial evidence that the insurer, National Fidelity Life Insurance Company, had a reasonable basis for denying the claim of the insured, the estate of George M. Chadima, the judge determined that the insurer's position was fairly debatable, and that the insurer was entitled to judgment notwithstanding the verdict. The estate of George M. Chadima appeals, and we reverse.

National Fidelity Life Insurance Company issued a life insurance policy to George M. Chadima on January 21, 1986. The policy was a declining death benefit policy. In April of 1989, Chadima contacted National Fidelity complaining that he thought he had purchased a $100,00 fixed death benefit policy, rather than a declining death benefit policy. He asked to convert his policy to a $100,000 fixed death benefit policy. National

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* The HONORABLE CHARLES A. SHAW, United States District Judge for the Eastern District of Missouri, sitting by designation.

Fidelity refused, but offered to issue a new policy with a $90,000 fixed death benefit. National Fidelity instructed Chadima to return the original policy with an executed change of policy form. On July 11, 1989, Chadima forwarded the policy and a change of policy form to National Fidelity. The request form provided that "the requested change(s) shall not take effect until approved in writing by the Company."

Chadima died October 26, 1989, before National Fidelity had changed or reissued the policy. At that time, the declining-benefit policy had a value of $134,973.20.

Chadima's estate filed a claim for benefits. Evidence at trial showed that a claims manager reviewed the policy file and determined that National Fidelity owed $136,692.72 because the original policy was still in effect. Nevertheless, National Fidelity tendered a check in the amount of $91,423.97, representing the $90,000 fixed death benefit requested by Chadima with interest.

Chadima's estate demanded payment under the original policy. After correspondence between the estate's attorney and National Fidelity, and pursuant to directions from its associate general counsel, National Fidelity acknowledged the original policy was still in effect and sent the estate an additional check for $46,072.89. Both checks included language releasing all claims against National Fidelity. The Chadima estate insisted on a written agreement allowing them to negotiate the checks without waiving any claims. Unable to reach a written agreement, National Fidelity orally instructed the estate to cross out the release language and cash the checks. The estate refused, afraid that National Fidelity was trying to mislead them.

Chadima's estate filed this action, asserting claims of first-

party bad faith, breach of contract, and fraud.[1] The parties tried the case before a magistrate judge. The magistrate judge initially concluded that under the most recent Iowa Supreme Court authority, *Wetherbee v. Economy Fire & Casualty Company*, 508 N.W.2d 657, 661 (1993), the court should decide as a matter of law whether National Fidelity had a reasonable basis for denying Chadima's claim. *Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1431 (S.D. Iowa 1994). The court proposed an instruction informing the jury that National Fidelity lacked a reasonable basis for denying the claim. Both sides objected to the instruction. Chadima's counsel argued that the jury, as the trier of fact, should decide whether National Fidelity had a reasonable basis for denying the claim. National Fidelity argued that the court should rule that National Fidelity had a reasonable basis for denying the claim, and thus, there was no first-party bad faith as a matter of law. National Fidelity agreed that if the court declined to find that National Fidelity reasonably denied the claim, then the jury should decide the question.

Reserving final judgment until post-trial motions, the magistrate judge submitted to the jury the question of whether National Fidelity had a reasonable basis for denying the claim. The jury found in Chadima's favor, awarding $34,029 in compensatory damages on the breach of contract and first-party bad faith claims, and $100,000 in punitive damages on the first-party bad faith claim.[2]

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1. Chadima's estate filed this action in Iowa state court, and National Fidelity removed the action based on diversity of citizenship. The parties consented to a jury trial before a United States magistrate judge.

2. In response to a special interrogatory submitted under Iowa Code Section 668A.1(1)(b), the jury also found that National Fidelity's conduct was not specifically directed at Chadima. Chadima filed a motion for entry of judgment

(Cont'd)

Appendix B

On post-trial motions, the magistrate judge determined that the Iowa Supreme Court decision in *Wetherbee* required him to determine as a matter of law whether the insurer's position was fairly debatable. *Chadima,* 848 F. Supp. at 1433. In *Wetherbee,* the Iowa Supreme Court stated unequivocally: "[w]hether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law." 508 N.W. 2d at 662.[3] The magistrate judge granted judgment notwithstanding the verdict to National Fidelity on Chadima's bad-faith claim, concluding that substantial evidence existed on both sides of the question of whether National Fidelity had a reasonable basis for denying the claim, and, therefore, National Fidelity's position was fairly debatable as a matter of law. *Chadima*, 848 F. Supp. at 1431-32 & n.14. Chadima's estate appeals, and the question before us is whether the court or jury should decide whether a claim is fairly debatable.[4]

(Cont'd)
pursuant to Rule 50 of the Federal Rules of Civil Procedure seeking to set aside this jury finding. The court granted the State of Iowa's motion to intervene, but determined the question moot after it set aside the punitive damage award. The State filed a brief with this court asking that if we reinstate the punitive damage award, we should remand the issue to the magistrate judge or uphold the jury finding.

3. The district court for the Southern District of Iowa recently cited this statement of Iowa law in *Weber v. State Farm Mutual Automobile Insurance Co.*, 873 F. Supp. 201, 205 (S.D. Iowa 1994). That case, however, did not address the issue before this court. *Id.*

4. National Fidelity cross appeals, arguing that the magistrate judge erred by refusing to grant judgment as a matter of law on the breach of contract claim. National Fidelity contends that we should reverse the jury verdict on the contract claim because no evidence supported breach of a specific term of the insurance contract, and because the estate failed to mitigate damages by refusing to cash the checks. In light of our decision on the first-party bad faith claim, we need not consider these arguments.

Appendix B

Chadima argues that the district court correctly recognized a factual dispute as to whether National Fidelity had a reasonable basis for denying Chadima's claim. Because of the factual dispute, Chadima contends the court correctly submitted the issue to the jury, but erred when it later entered judgment as a matter of law for National Fidelity. Chadima argues that *Wetherbee* does not control because, in that case, the insurer declined coverage based on a legal issue. Chadima then argues that when, as here, the insurer denies coverage based on a factual dispute, the issue must go to the jury.

We review the magistrate judge's determination of Iowa law de novo, giving it no deference. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). The district court's decision to enter judgment notwithstanding the verdict is a ruling of law that we also review de novo.[5] *Nelson v. Production Credit Ass'n of the Midlands*, 930 F.2d 599, 603 (8th Cir.), *cert. denied*, 502 U.S. 957 (1991).

The Iowa Supreme Court first recognized the intentional tort of first-party bad faith in *Dolan v. Aid Insurance Co.*, 431 N.W.2d 790 (Iowa 1988). To establish first-party bad faith, an insured must show that: (1) the insurer had no reasonable basis for denying benefits under the policy; and (2) the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the claim.[6] *Id.* at 794. The court explained that when "a claim is

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5. There is a question as to whether we should apply state or federal law standards to motions for a judgment notwithstanding the verdict in a diversity case. *See Keenan v. Computer Assoc. Int'l*, 13 F.3d 1266, 1269 n.3 (8th Cir. 1994). Because the standards under federal or Iowa law are the same, the question has no significance to this case.

6. The Iowa Supreme Court modified the second part of the test in *Kiner v.* (Cont'd)

'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Id.* (citing *M-Z Enterprises v. Hawkeye Security Ins. Co.*, 318 N.W.2d 408, 415 (Iowa 1982)).

Chadima contends that *Wetherbee* did not change existing law, but merely stated the obvious proposition that when only the legal construction of a policy is at issue, the question of the insurer's reasonableness should be decided as a matter of law. Chadima contends that under Iowa law, a factual dispute as to the reasonableness of the insurer's denial is an issue for the jury, as shown by *Kiner v. Reliance Insurance Co.*, 463 N.W.2d 9 (Iowa 1990), and *Nassen v. National States Insurance Co.*, 494 N.W.2d 231 (Iowa 1992), *cert. denied*, 113 S. Ct. 1846 (1993).

In *Kiner*, the Iowa Supreme Court considered the insurer's argument that the trial court erred by submitting the bad faith claim to the jury because the claim was fairly debatable as a matter of law. 463 N.W.2d at 12. The insurer had reimbursed its insured for pain medication for eight years, but then refused reimbursement, contending that the insured had a drug dependency problem. *Id.* at 11. The court determined that a reasonable fact finder could conclude that the insurer failed to exercise an honest and informed judgment in denying the claim, and thus, could conclude that the insurer's denial was not fairly debatable. *Id.* at 12. The court concluded the issue was "one for the jury, not for the court as a matter of law." *Id.* at 12.

Likewise, in *Nassen*, the insurer argued the trial court erred

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(Cont'd)

Reliance Insurance Co., 463 N.W.2d 9 (Iowa 1990). It is now sufficient to show that the insurer denies a claim knowing or having reason to know that its denial is without a reasonable basis. *Id.* at 13.

by failing to direct a verdict on the bad faith claim. 494 N.W.2d at 236. The insurer pointed to the insured's failure to disclose two allegedly preexisting health conditions as proof that the insured's claim was fairly debatable as a matter of law. *Id.* The court concluded that the insurer had no proof that the insured intentionally misrepresented health information on her insurance application because the alleged preexisting conditions were only suspected initial diagnoses which never were confirmed during her subsequent hospital stay. *Id.* "The 'fairly debatable' test approved in *Dolan* require[s] [the insured] to establish to the satisfaction of a reasonable fact finder that [the insurer's] decision to rescind her policy was not based on an honest and informed judgment." *Id.* The court dismissed the insurer's explanation for denying the claim and stated, "[u]nder the circumstances, the question of bad faith was for the jury to decide." *Id.*

National Fidelity refutes Chadima's interpretation of Iowa law, contending that the fairly debatable question is a threshold legal inquiry. National Fidelity argues that the trial court must first determine that a claim cannot be fairly debated before submitting the bad faith issue to the jury.[7] National Fidelity argues that *Kiner* and *Nassen* support its interpretation of Iowa law and demonstrate that the jury can decide if the insurer acted with bad faith only after the judge decides that the insurer's denial was not fairly debatable.

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7. The American Council of Life Insurance filed an amicus curiae brief in support of National Fidelity. The Council argues that Chadima's claim is fairly debatable because of a patent ambiguity in the insurance documents executed by Chadima. The Council contends that the insurance policy differs from the change of policy form because the policy provides that any subsequent changes to the policy take effect immediately upon receipt by National Fidelity. We cannot evaluate this argument, as the insurance policy was not admitted as evidence at trial.

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Besides *Wetherbee*, National Fidelity cites several cases to demonstrate this two-part inquiry. First, in *Reuter v. State Farm Mutual Automobile Insurance Co.*, 469 N.W.2d 250 (Iowa 1991), the Iowa Supreme Court concluded that the insurer's denial was fairly debatable as a matter of law. *Id.* at 255. The insured had been injured in a car accident, and the insurer initially paid for chiropractic care. *Id.* at 251-52. Some months later, the insured filed another claim for chiropractic care, and the insurer denied coverage. *Id.* Because the first doctor had indicated further treatment would be minimal, and a consultant questioned the need for additional treatment, the court concluded the insurer had an "objectively reasonable basis" for its denial, and the claim was fairly debatable as a matter of law. *Id.* at 255. Similarly, in *Central Life Insurance Co. v. Aetna Casualty & Surety Co.*, 466 N.W.2d 257 (Iowa 1991), the court reversed a jury's determination of bad faith, concluding that the claim was fairly debatable as a matter of law. *Id.* at 263. The insurer reimbursed the insured for loss based on two appraisals. *Id.* Although the insurer unsuccessfully attempted to refute the insured's higher appraisal, the court reiterated that the insurer had the right to fairly debate the appraisal award. *Id.* Accordingly, the court determined the insurer had an objectively reasonable basis for its denial, and judgment for the insurer should be entered as a matter of law. *Id.* Finally, National Fidelity contends that *Dirks v. Farm Bureau Mutual Insurance Co.*, 465 N.W.2d 857 (Iowa 1991), confirms the two-part inquiry. In *Dirks*, an insured sued for failure to pay underinsured motorist benefits. *Id.* at 859. The Iowa Supreme Court affirmed the trial court's grant of judgment notwithstanding the verdict on the bad faith claim, concluding there was not substantial evidence to support the jury's finding that the insurer lacked a reasonable basis for denying the insured's claim. *Id.* at 862. The court observed that the insurer initially denied the claim for several valid reasons. *Id.* at 861-62.

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The insurer received conflicting information about the circumstances of the accident, and the police officers and reconstruction experts failed to confirm where it occurred. For these reasons, the court affirmed the trial court's ruling that the insured's claim was fairly debatable, and thus, the insured did not act in bad faith as a matter of law. *Id.* at 862.

Although the statement in *Wetherbee* that whether a claim is fairly debatable is a question of law for the court to decide is inconsistent with statements in *Kiner* and *Nassen,* we do not believe the cases are irreconcilable. *Wetherbee* can be read as giving the trial court the opportunity to decide as a matter of law in the appropriate circumstances whether the insurer had a reasonable basis for denying the claim, but not mandating the court to do so. For example, the insurer in *Wetherbee* denied the insured's loss of consortium claim based on its interpretation of the governing policy and Iowa's underinsured motorist statute. 508 N.W.2d at 658-59. The trial court concluded that no coverage existed under the insurance policy, and thus, as a matter of law, the insurer could not be liable for bad faith. *Id.* at 661.

The procedural posture of this case is more like that in *Kiner* and *Nassen.* In those cases, the parties disputed whether the insurer had a reasonable basis for denying the claim. Likewise, National Fidelity claimed to have made an honest mistake based on confusion, while Chadima painted a picture of an outright attempt to short change the estate by almost $50,000. Evidence supported both stories, creating a genuine issue of material fact as to whether National Fidelity had a reasonable basis for denying the claim.

The cases cited by National Fidelity do not require the court to first determine as a matter of law whether the insured's position

is fairly debatable. National Fidelity's interpretation of Iowa law as requiring the court to first decide whether the insurer had an objectively reasonable basis for denying a claim is really only the flip-side of whether the insured has met its burden of producing evidence that the insurer has no reasonable basis for denying the claim. The cases cited by National Fidelity hold that the insurer was entitled to judgment as a matter of law because the insured produced no evidence upon which a jury could find that the insurer lacked a reasonable basis for denying the claim. *See, e.g., Reuter,* 469 N.W.2d at 255 (insurer denied claim based on physician and consultant reports); *Central Life Ins. Co.,* 466 N.W.2d at 263 (insurer denied claim based on appraisal); *Dirks,* 465 N.W.2d at 862 (insurer denied claim based on conflicting accident reports); *see also Dolan,* 431 N.W.2d at 794-95 (court focused on insurer's investigation of the claim and distinguished case from situation in which insurer denies a claim without an investigation or evaluation). When there is no evidence from which a reasonable juror could make a necessary finding, the insurer is entitled to judgment as a matter of law. *See Dace v. ACF Indus. Inc.,* 722 F.2d 374, 375-76 (8th Cir. 1983) (setting forth standard for directed verdict and j.n.o.v.). Whether evidence is sufficient to create an issue of fact for the jury to decide is a question of law. *Nelson,* 930 F.2d at 604, n.6.

A careful reading of *Central Life* also supports our interpretation of Iowa law. In *Central Life*, the court set aside the jury's verdict on the bad faith claim based on the trial court's jury instruction which prevented the jury from considering the reasonableness of the insurer's actions. 466 N.W.2d at 263. Although the court went on to conclude that the trial court should have directed a verdict for the insurer, it did so because the insured failed to prove that the insurer lacked a reasonable basis

for its action, not because the court was required to decide the reasonableness of the insurer's denial. *Id.*[8]

If the insurer has an "objectively reasonable" explanation for its denial, the insurer may be entitled to summary judgment or a directed verdict on a bad faith claim. In such a case, the reasons supporting the insurer's denial cannot be the subject of a genuine factual dispute. Otherwise, and under National Fidelity's interpretation of Iowa law, an insurer could avoid bad faith liability simply by relying on the after-the-fact explanation of its own claims personnel.

The evidence set forth in the Magistrate judge's opinion establishes a genuine issue of material fact as to whether National Fidelity had a reasonable basis for denying Chadima's claim. Chadima's estate met its burden of producing sufficient evidence from which a reasonable jury could conclude that National Fidelity had no reasonable basis for denying the claim. Therefore, the issue was for the jury to decide, and the magistrate judge erred by directing a verdict for National Fidelity on the bad faith claim. This said, we conclude that the jury's finding that National Fidelity acted in bad faith is sufficiently supported by the evidence. *See Keenan v. Computer Assoc. Int'l. Inc.*, 13 F.3d 1266, 1269 (8th Cir. 1994) (judgment as a matter of law

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8. Our interpretation of Iowa law is consistent with other decisions interpreting other states' laws. *See, e.g., American States Ins. v. State Farm Ins.*, 6 F.3d 549, 552-53 (8th Cir. 1993) (under South Dakota law, if substantial evidence exists which would allow reasonable minds to differ as to whether the insurer's action was fairly debatable, the case must go to the jury); *Bilden v. United Equitable Ins. Co.*, 921 F.2d 822, 827-28 (8th Cir. 1990) (applying North Dakota law and rejecting insurer's argument that trial court erred by failing to decide "fairly debatable" question as a matter of law); *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1181-82 (9th Cir. 1988) (same result, applying Arizona law).

appropriate only when all of the evidence points one way and there is no reasonable inference sustaining the position of the nonmoving party). The issues raised by Chadima and the State of Iowa as to the apportionment of punitive damages are best addressed by the trial judge.

We reverse and remand with directions to reinstate the jury verdict against National Fidelity on Chadima's first-party bad faith claim and for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION DATED MARCH 25, 1994

George W. CHADIMA, et al., Plaintiffs,

v.

NATIONAL FIDELITY LIFE INSURANCE COMPANY,

Defendant,

and

State of Iowa, ex rel., Civil Reparations Trust Fund, Intervenor.

No. 3-90-CV-30058.

United States District Court,

S.D. Iowa,

Davenport Division.

March 25, 1994.

Kevin H. Collins of Shuttleworth & Ingersoll, P.C., Cedar Rapids, Iowa, for plaintiffs.

Thomas J. Shields, Lane & Waterman, Davenport, Iowa, for defendant.

MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFFS' CLAIM FOR COMMON LAW ATTORNEY FEES AND THE PARTIES' POST TRIAL MOTIONS

BENNETT, United States Magistrate Judge.

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* * *

This litigation arises from a dispute regarding which one of two National Fidelity Life Insurance Company ("National Fidelity") policies for George Milton Chadima was in effect at the time of his death in 1989. A jury returned a verdict for compensatory damages on Plaintiffs' breach of contract and first-party bad faith claims. The jury also awarded punitive damages on the bad faith claim. Plaintiffs seek an additional remedy of common law attorney fees. Plaintiffs also seek to overturn the jury finding by special interrogatory that National Fidelity's conduct was not directed specifically at the Plaintiffs. This would allow the Plaintiffs to defeat Intervenor State of Iowa's statutory claim of entitlement to 75 percent of the punitive damage award. National Fidelity, through post trial motions, under Federal Rules of Civil Procedure 50 and 59, is attacking the validity of the jury's verdict and subsequent judgment on both the breach of contract and first-party bad faith claims.

I. *INTRODUCTION AND BACKGROUND.*

This breach of insurance contract and first-party bad faith case was removed from state court to the United States District Court for the Southern District of Iowa, Davenport Division, on April 30, 1990. The litigation arises as a result of the purchase of life insurance by George Milton Chadima from National Fidelity in January of 1986 and his attempt to obtain a modified or new policy from National Fidelity in 1989. George Milton Chadima died on October 26, 1989. The Plaintiffs in this litigation are his son, George W. Chadima, and the Swisher Trust and Savings Bank as trustees of the George Milton Chadima and Lillian Esther Chadima Trust; and Lillian Esther Chadima and George W. Chadima as Executors of the Estate of George Milton Chadima, Deceased (collectively referred to as "Chadima" or "Plaintiffs").

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On March 15, 1993, the parties filed a consent to proceed before a United States magistrate judge in accordance with the provisions of 28 U.S.C. § 636(e). A jury trial commenced on January 18, 1994.

On January 20, 1994, the jury returned a verdict in favor of Chadima on both the breach of an insurance contract claim and first-party bad faith claim. The jury awarded the Plaintiffs $34,029.00 in compensatory damages and $100,000.00 in punitive damages. The punitive damages were awarded on the first-party bad faith claim. Judgment, based upon the jury verdict, was entered on January 24, 1994.

Concerning the punitive damages, in response to a special interrogatory required by Iowa Code § 668A.1(1)(b) (1993), the jury answered in the negative, "Whether the conduct of the defendant was directed specifically at the claimant, or at the person from which the claimant's claim is derived." Iowa Code § 668A.1(1)(b) (1993). As a result, "after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator." Iowa Code § 668A.1(2)(b). If the jury had answered the special interrogatory that National Fidelity's conduct was directed specifically at Chadima, then Chadima would not be required to share the punitive damage award with the State of Iowa Civil Reparations Trust Fund. Iowa Code § 668A.1(2)(b) (1993).[1]

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1. Iowa is one of only eight states to have passed legislation requiring payment of some portion of punitive damages to the state or state-sponsored funds. (Cont'd)

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Not surprisingly, National Fidelity has filed post trial

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The rationale underlying Iowa's punitive damage legislation is "that 'a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it.' " *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 869 (Iowa 1994) (citing *Shepherd Components v. Brice Petrides-Donahue & Associates*, 473 N.W.2d 612, 619 (Iowa 1991)). Section 668A.1 "was designed to divert a portion of a resulting punitive damage award to a public purpose." *Spaur*, 510 N.W.2d at 869 (citing *Fernandez v. Curley*, 463 N.W.2d 5, 8 (Iowa 1990)).

The other seven states with similar punitive damage legislation are: Colorado (Colo Rev.Stat. § 13-21-102[4] [1987]), Florida (Fla.Stat. § 768.73[2][b] [1993 Supp.]), Georgia (Ga.Code Ann. § 51-12-5.1[e][2] [1993 Supp.]), Missouri (Mo.Rev.Stat. § 537.675[2] [1992 Supp.]), New York (N.Y.Civ.Prac.L. & R § 8701 [McKinney 1993 Supp.]), Oregon (Or.Rev.Stat. § 18.540[1] [1991]) and Utah (Utah Code Ann. § 78-18-1[3] [1992]).

Four of the eight states have addressed the constitutionality of such provisions. Two courts have held such statutes to be unconstitutional. *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991) (Colorado supreme Court held that a statute requiring payment of one-third of the punitive damages to the state general fund was an unconstitutional taking of private property without just compensation); *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D.Ga.1990) (Federal district court held unconstitutional, in violation of the excessive fines provision of the Fifth Amendment of the United States Constitution, a provision requiring 75 percent of a punitive damage award, in product liability cases only, be paid to the state treasury). Three other courts have upheld the constitutionality of such statutes. *Gordon v. State*, 585 So.2d 1033 (Fla.Dist.Ct.App. 1991) (Florida appellate court upheld the constitutionality of Florida statute requiring payment of 60 percent of the punitive damage award to the state general revenue fund or public medical assistance trust fund depending on the type of cause of action. The court found no unconstitutional taking of property without due process because a plaintiff had no constitutionally protectable right to recover damages), *aff'd*, 608 So.2d 800 (Fla.1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1647, 123 L.Ed.2d 268 (1993); *Shepherd Components v. Brice Petrides-Donohue Associates*, 473 N.W.2d 612
(Cont'd)

motions pursuant to Federal Rules of Civil Procedure 50 and 59 to set aside the jury's verdict and the judgment. Additionally, Chadima has filed a motion for entry of judgment pursuant to Federal Rule of Civil Procedure 50 seeking to set aside the jury's determination pursuant to § 668A.1(1)(b) that National Fidelity's conduct was not directed specifically at Chadima. Additionally, pursuant to an agreement of the parties at trial, deferring the questions of Chadima's entitlement to and amount of reasonable common law attorney fees, Chadima has moved for attorney fees and costs in the amount of $60,540.21. National Fidelity has strenuously resisted Chadima's entitlement to and the amount of requested attorney fees.

A hearing on post trial motions and Chadima's request for attorney fees was held on March 11, 1994. Chadima was represented by Kevin H. Collins of Shuttleworth & Ingersoll, P.C., Cedar Rapids, Iowa. National Fidelity was represented by Thomas J. Shields of Lane & Waterman, Davenport, Iowa. The State of Iowa, as a result of their interest in 75 percent of the punitive damages being awarded to the civil reparations trust fund was represented at the hearing by Richard E. Mull, Iowa Assistant Attorney General. Immediately prior to the hearing on post trial motions, the State of Iowa *ex relatione* Civil

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(Iowa 1991) (Iowa Supreme Court upheld the constitutionality of § 668A.1(2)(b)); *Mack Trucks, Inc. v. Conkle*, 263 Ga, 539, 436 S.E.2d 635 (1993) (Georgia Supreme Court upheld statute providing that 75 percent of punitive damage award paid into state treasury only in product liability cases did not violate equal protection clause of Fourteenth Amendment nor constitute a taking under Fifth and Fourteenth Amendments). The differing results seen in the *Conkle* and *McBride* decisions regarding Georgia's statute can be explained in part by the fact that the two respective courts analyzed the Georgia statute provision under different federal constitutional amendments.

Reparations Trust Fund filed a written motion for joinder or intervention. Before turning to Chadima's motion for attorney fees and the post trial motions filed by Chadima and National Fidelity, the court will briefly set forth the factual background and address the State of Iowa's motion for joinder or intervention.

II. *FACTUAL BACKGROUND.*

The following facts are not seriously in dispute. In January of 1986 National Fidelity issued Policy No. 550529, a declining death benefit policy, to George Milton Chadima. This was not the coverage that George Milton Chadima desired and he requested that National Fidelity convert the policy to a fixed death benefit policy of $100,000.00. National Fidelity declined to convert the policy but indicated it would be willing to issue a new fixed death benefit policy with a death benefit of $90,000.00. National Fidelity instructed George Milton Chadima to return his policy together with an executed policy request form. In July 1989, George Milton Chadima sent to National Fidelity his insurance policy and the executed policy owner request form.

The policy owner request form indicated that the change would not be effective until approved in writing by the company. However, George Milton Chadima's actual policy of insurance provided that any changes in coverage were effective upon receipt by the company.

George Milton Chadima died on October 26, 1989 before the policy had been changed or reissued by National Fidelity. As of the date of George Milton Chadima's death, his original policy had a face value of $134,973.20. George Milton Chadima was not notified in writing by National Fidelity prior to his death of the change in policies he had requested.

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On January 11,1990, National Fidelity tendered a check in the amount of $91,423.97 in full payment of the death benefits under Policy No. 550529 (this included the $90,000.00 amount of the policy plus interest due under the policy at 7.5 percent from the date of death). Prior to forwarding this check, Catherine Bicknell White, a claims examiner for National Fidelity, reviewed the claim and the company file and indicated she believed Chadima was entitled to the amount of $136,692.72. However, after consultation between Jan Perrine, the claims manager for National Fidelity, and Robert Burkett, National Fidelity's association general counsel, a decision was made to tender a check in the amount of $91,423.97 in full payment.

Plaintiffs, through their attorneys, promptly notified National Fidelity that the policy had not been changed and that the Plaintiffs were entitled to the greater amount arising under the initial policy. National Fidelity initially refused to pay the full amount due under the original policy.

At this posture of the proceedings, there are substantial factual conflicts and the parties' assertions of what transpired differ dramatically. In Plaintiffs' view, associate general counsel Robert Burkett and claims manager Jan Perrine intentionally concealed the fact that the policy request form had not been acted upon in an attempt to persuade the Plaintiffs to accept the lesser amount that would be due them under the newer policy requested by George Milton Chadima.

National Fidelity characterized these subsequent events as an honest attempt by Ms. Perrine and Mr. Burkett to determine whether the Plaintiffs were due the $90,000.00 under the requested policy change by George Milton Chadima or the $136,692.72 due under the original policy (because the change requested by George Milton Chadima had not become effective).

In any event, it is undisputed that on February 22, 1990, National Fidelity forwarded to the Plaintiffs an additional check in the amount of $46,072.89 which represents the amount due under the original policy plus accrued interest. Both the original $90,000.00 check and the subsequent $46,072.89 check included release language on the back of the checks requiring the Plaintiffs to waive all other claims they may have against National Fidelity. Plaintiffs insisted on a written agreement allowing Plaintiffs to negotiate the checks tendered by National Fidelity without waiving any of their claims. The Plaintiffs and National Fidelity negotiated with each other concerning such a written agreement but were unable to arrive at an agreement. The undisputed evidence is that National Fidelity orally instructed Plaintiffs' counsel to cross out the release language and cash the checks. The Plaintiffs testified they believed they had been misled by National Fidelity throughout their efforts to ascertain which policy was in effect and, therefore, refused to cross out the release language.

III. *STATE OF IOWA'S MOTION FOR JOINDER OR INTERVENTION.*

At the beginning of the hearing on post trial motions held on March 11, 1994, both Chadima and National Fidelity indicated that they would not resist the State of Iowa's motion for joinder or intervention. The court indicated to the parties that they would have an opportunity to file written resistances to the State's motion but the parties agreed the State had a right to intervene and that any further resistances or hearings on the issue would unnecessarily add to the cost and delay of this litigation. The court applauds the candor and concerns of the parties. The court, during the March 11, 1994 hearing, orally granted the State's motion to intervene. The court will briefly explain why the motion was granted.

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Federal Rule of Civil Procedure 24(b)(2) provides that upon timely application the court may allow an applicant to intervene when the applicant's claim or defense and the main action share a common question of law or fact.[2] *See* 7C Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d § 1911 at 355 (2d ed. 1986). It is within the trial court's discretion to allow an applicant to intervene. *See Webster Groves Sch., Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir.1990). In exercising its discretion, the court is to consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *See* 7C Wright, Miller & Kane, *supra*, § 1911 at 355 (2d ed. 1986). Any doubts the court has concerning intervention are to be resolved in favor of the applicant for intervention. *See Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175, 177 (8th Cir.1978) (quoting *Kozak v. Wells*, 278 F.2d 104, 112 (8th Cir. 1960)).

Under Federal Rule of Civil Procedure 24(a)(2), a timely motion to intervene should be granted when the following three conditions are met:

> 1) the proposed intervenor has an interest in the subject matter of the action; 2) the interest may be impaired; and 3) the interest is not adequately represented by an existing party to the action.

Sierra Club v. Robertson, 960 F.2d 83, 85 (8th Cir.1992).[3]

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2. Federal Rule of Civil Procedure 24(b) states: Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

3. Federal Rule of Civil Procedure 24(a) provides:

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"Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all controversies in a single action." *Id.* at 86. Iowa Code § 668A.1(2)(b) provides as follows:

> . . . after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the punitive or exemplary damages awarded may be ordered paid to the claimant, with the remainder of the award to be ordered paid into a civil reparations trust fund administered by the state court administrator. Funds placed in the civil reparations trust shall be under the control and supervision of the executive council, and shall be disbursed only for purposes of indigent civil litigation programs or insurance assistance programs.

Thus, the State of Iowa has an interest in the punitive damage award that is both separate, distinct, and adverse to that of Chadima and, potentially, National Fidelity. Also, neither Chadima nor National Fidelity could adequately represent the interests of the State of Iowa in the punitive damage award. Therefore, the State of Iowa *ex relatione* Civil Reparations Trust Fund may intervene in this litigation pursuant to Federal Rule of Civil Procedure 24(a)(2).

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> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to project that interest, unless the applicant's interest is adequately represented by the existing parties.

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IV. *CHADIMA'S CLAIM FOR COMMON LAW ATTORNEY FEES.*

Near the conclusion of the trial, and by agreement of the parties, the court deferred to post trial proceedings Chadima's claim for common law attorney fees. Under Iowa law "[t]he determination of a common law attorney fee award rests in the court's equitable powers." *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993) (citing *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 n. 30, 95 S.Ct. 1612, 1621-22 n. 30, 44 L.Ed.2d 141 (1975)). Moreover, "the court should not delegate its equitable power to the jury." *Id.* at 159.

Chadima has now filed two affidavits in support of attorney fees. Chadima is seeking a total of $60,540.21 in attorney fees and expenses. Chadima's claim for attorney fees and expenses has been strenuously resisted by National Fidelity. At the March 11, 1994 hearing on post trial motions, National Fidelity requested an opportunity to engage in discovery to support its resistance concerning the reasonableness of the amount of attorney fees and costs claimed by Chadima. At that hearing, the court indicated it would first decide the question of Chadima's entitlement to common law attorney fees and, if entitled to fees, would then provide National Fidelity with an opportunity for discovery followed by an evidentiary hearing to determine the amount of fees to be awarded.

The general rule in Iowa is that a party is not entitled to attorney fees in the absence of a contractual or statutory provision allowing such an award. *Hockenberg Equip. Co.*, 510 N.W.2d at 158. This rule, and its exception, is stated by the Iowa Supreme Court in *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1585), as follows:

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> Attorney fees are generally not recoverable as damages in the absence of a statute or a provision in a written contract. *See, e.g., Lickteig v. Iowa Dep't of Transp.*, 356 N.W.2d 205, 212 (Iowa 1984). This general rule, however, is subject to an exception. In *Kuiken v. Garrett, we* allowed attorney fees on common law theories because defendants' conduct was "oppressive and tinctured with legal malice." 243 Iowa 785, 800, 51 N.W.2d 149, 158 (1952). *See also Harmont v. Sullivan,* 128 Iowa 309, 317, 103 N.W. 951, 954 (1905) (attorney fees recoverable where there was "connivance" by one litigant to "harass and injure" other litigant).

In *Hockenberg Equip., Co.*, the court observed that the exception to the general rule is "rare" and available only "when the losing party has acted in bad faith" vexatiously, wantonly, or for oppressive reasons." *Id.* at 158 (citing *Alyeska Pipeline Serv.*, 421 U.S. at 258-59, 95 S.Ct. at 1622).

In *Hockenberg Equip. Co.*, the court noted that while it recognized "this exception, the exact standard is not clear." *Id.* at 158. The court also observed that "[o]ur most recent treatment of the issue suggests that the recovery of attorney fees requires a showing of culpability beyond the showing required for punitive damages." *Id.* at 159. In 1986, the enactment of Iowa Code chapter 668A, 1986 Iowa Acts ch. 1211, § 42, displaced the prior Iowa common law "with respect to the standard for recovery of punitive damages." *Hockenberg Equip. Co.*, 510 N.W.2d at 159. Under § 668A.1, "the plaintiff seeking a punitive damage award must prove that the defendant's conduct amounted to a willful and wanton disregard for the rights of another." *Id.* In examining its prior precedents, the Iowa Supreme Court noted that the standard for common law attorney fees "require at the very least a

showing that the Defendant's culpability exceeded the section 668A.1 standard." *Id.*[4]

The court in *Hockenberg Equipment Co.* concluded that:

> Therefore, a plaintiff seeking common law attorney fees must prove that the culpability of the defendant's conduct exceeds the "willful and wanton disregard for the rights of another"; such conduct must rise to the level of oppression or connivance to harass or injure another.

Id. at 159-60. Chadima's proof on both the breach of contract claim and the first-party bad faith claim clearly fail to meet the rarified standard of proof required by *Hockenberg Equipment Co.* The court does not believe that Chadima's evidence exceeds the "willful and wanton disregard for the rights of another" punitive damage standard necessary to trigger an award of common law attorney fees. Conversely, Chadima's evidence does not "rise to the level of oppression or connivance to harass or injure another." *Hockenberg Equip. Co.*, 510 N.W.2d at 159-60. Chadima is not entitled to common law attorney fees. Thus, this court need not reach the question of the reasonableness of Chadima's requested fees.[5]

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4. As an example of its prior case law, suggesting a higher standard for common law attorney fees than for punitive damages the Iowa Supreme Court noted that in *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1985), the court required a finding of "oppressive" conduct for an award of attorney fees. Oppressive conduct denotes "conduct that is difficult to bear, harsh, tyrannical, or cruel. *See, e.g.*, Black's Law Dictionary 1093 (6th ed.1990); The American Heritage Dictionary 872 (2d College Ed. 1985)." *Hockenberg Equip. Co.*, 510 N.W.2d at 159.

5. While the court expresses no opinion concerning the reasonableness of Chadima's requested fees one additional observation regarding the fee request is in

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V. *NATIONAL FIDELITY'S TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW AND POST TRIAL MOTIONS.*

A. Introduction

At the conclusion of the jury trial, National Fidelity moved orally and in writing for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. On February 1, 1994, National Fidelity filed a Renewed Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial pursuant to Federal Rules of Civil Procedure 50 and 59. These motions were timely resisted by Chadima, extensively briefed by the parties and fully argued at the March 11, 1994 hearing on post-trial motions. The thrust of National Fidelity's trial motion for judgment as a matter of law and post trial motions may be summarized as follows: (1) because National Fidelity's obligation to pay Chadima under the fixed death benefit policy or declining death benefit policy was fairly debatable, there can be no finding of bad faith as a matter of law; (2) that there was no legally sufficient evidentiary basis upon which a reasonable jury could find that National Fidelity breached its contract of insurance with Chadima; (3) that Chadima failed to mitigate

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order. The itemization of fees requested by Chadima appears to fall short of the requirements set forth by this court in *Houghton v. Sipco, Inc.*, 828 F.Supp. 631, 643-44 (S.D.Iowa 1993). In *Houghton*, the court criticized "block billing" — where billing records indicate that a block of time was spent but fail to disclose how much time was expended by each attorney on each task. In the context of an ADEA and ERISA action, the court observed "block billing, while no doubt utilized by some firms in the greater Des Moines market area is grossly insufficient to satisfy the adequate itemization requirement of Local Rule of Court 22 and federal fee-shifting statutes in general." *Houghton*, 828 F.Supp. at 644.

damages by refusing to negotiate the checks sent by National Fidelity which constituted full payment of the benefits to Chadima under the declining death benefit policy; and (4) that Chadima failed to adduce sufficient evidence pursuant to Iowa Code § 668A.1 to recover exemplary or punitive damages. Before turning to the merits of National Fidelity's assertions, the court will address the appropriate standard for determining National Fidelity's trial and post trial motions.

B. The Appropriate Standard for Determining National Fidelity's Post Trial Motions

While neither Chadima, National Fidelity nor Intervenor State of Iowa has raised the question, "[t]here is some uncertainty about whether federal courts should apply state law standards or federal law standards to motions for a judgment notwithstanding the verdict in diversity cases." *Keenan v. Computer Assoc. Int'l, Inc.*, 13 F.3d 1266, 1268 n. 3 (8th Cir.1994).[6]

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6. The circuits are in conflict over what standard should be applied in diversity cases. *Compare Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1181 (7th Cir.1992) ("In diversity cases, state law governs the standard of review of a denial of a motion for judgment notwithstanding the verdict"), *cert. denied*, __U.S.__, 113 S.Ct. 1274, 122 L.Ed.2d 669 (1993) with *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3rd Cir.1992) (applying federal law standard). In *Keenan*, however, the court did not resolve the question of whether federal or state law controls the motion for judgment notwithstanding the verdict in a diversity case because it found that "the federal standard and the Minnesota standard are virtually identical." *Keenall*, 13 F.3d at 1269 n. 3. Similarly, it is unnecessary for the court to resolve that issue in this litigation as the federal standard for motions notwithstanding the verdict and the Iowa standard for such motions are nearly identical. *Compare White v. Pence*, 961 F. 2d 776, 779 (8th Cir. 1992) (court must view "evidence in the light most favorable to the prevailing party) with *Federal Land Bank v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992) (court "must view the evidence in the light most favorable to the party against

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Federal Rule of Civil Procedure 50 entitled "Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings" states in relevant part:

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment. (b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION

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whom the motion is directed") and *Hockenberg Equip. Co.*, 510 N.W.2d at 156 (" '[the] evidence, taken in the light most favorable to the party resisting the motion, regardless [of] whether the evidence was contradicted, and taking every legitimate inference that might be fairly or reasonably deducted therefrom, showed that the movant was entitled to a directed verdict at the close of all evidence.' ") (quoting *Suss*, 375 N.W.2d at 255).

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> FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. . . .

Fed.R.Civ.P. 50(a) & (b).[7]

Federal Rule of Civil Procedure 59 entitled "New Trials; Amendment of Judgments" states in relevant part:

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7. While Rule 50 was amended effective December 1, 1993, the amendment was technical in nature. The committee Notes to Rule so indicate:

> This technical amendment corrects an ambiguity in the test of the 1991 revision of the rule, which, as indicated in the Notes, was not intended to change the existing standards under which "directed verdicts" could be granted. This amendment makes clear that judgments as a matter of law in jury trials may be entered against both plaintiffs and defendants and with respect to issues or defenses that may not be wholly dispositive of a claim or defense.

Fed.R.Civ.P. 50 advisory committee's note.

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> (a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Fed.R.Civ.P. 59(a).

Because there has been some confusion in the district courts in this circuit[8] and because there are substantial differences in the

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8. In *United States v. Schay*, 746 F.Supp. 877, 880 (E.D.Ark, 1990), *rev'd sub nom. White v. Pence*, 961 F.2d 776 (8th Cir. 1992), the court stated:

> [T]his court has, over the last several years, had occasion to consider the standard to be applied in ruling on motions for a new trial several times, and must confess that this court simply does not know with any certainty what standard is to be applied by the trial courts in this circuit. The court respectfully believes that this confusion is occasioned by changing and shifting language contained in various opinions of the Court of Appeals for this circuit.

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standards to be applied under Federal Rules of Civil Procedure 50 and 59, the court will examine the appropriate standard to be applied under each rule. As the court recently stated in *White v. Pence*, 961 F.2d 776, 779 (8th Cir.1992), "it is evident that the standards for considering a motion for j.n.o.v. differ thoroughly from those governing consideration of a motion for new trial." The court in *Pence* carefully delineated the appropriate standards between these two motions.

Thus, in determining a motion for j.n.o.v. (and the current parlance of Federal Rule of Civil Procedure 50a motion for judgment as a matter of law) [9], the court in *Pence* observed:

> the question is a legal one, whether there is sufficient evidence to support a jury verdict. This court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. *See Dace v. ACF*

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This confusion has apparently been alleviated by the court's decision in *White v. Pence*, 961 F.2d 776 (8th Cir.1992). "As to the standard to be applied in considering motions for a new trial, at least in this court's view, the 'law' in the Eighth Circuit before this court's decision in *White v. Pence*, 961 F.2d 776 (8th Cir.1992) had been cloudy, if not opaque." *Jackson v. Swift-Eckrich, Inc.*, 836 F.Supp. 1447, 1450 (W.D.Ark.1993).

9. "[P]rior to 1991 amendments made the Federal Rules of Civil Procedure, a Rule 50 motion was a motion for directed verdict or motion for judgment notwithstanding the verdict. The 1991 amendments merely changed the names of these motions, but the standard for application of this rule remains the same." *Jackson*, 836 F.Supp. at 1449.

> *Indus., Inc.*, 722 F.2d 374, 375-76 (8th Cir.1983), *supplemented*, 728 F.2d 976 (1984). We have also stated that to sustain a motion for j.n.o.v., all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party. *Id.* at 375; *Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1407 (8th Cir.1987); *Brown [v. Syntex Lab., Inc.]*, 755 F.2d [668] at 671 [(8th Cir.1985)]. These principles have no application to the consideration of a motion for new trial on the ground that the verdict is against the weight of the evidence.

Pence, 961 F.2d at 779 (footnotes omitted). *See also First Dakota Nat'l Bank v. Saint Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 808-09 (8th Cir.1993). Thus, this standard requires the district court to:

> "consider the evidence in the light most favorable to the prevailing party, assume that the jury resolved all conflicts of evidence in favor of that party, assume as true all facts which the prevailing party's evidence tended to prove, give the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts, and deny the motion, if in light of the foregoing, reasonable jurors could differ as to the conclusion that could be drawn from the evidence."

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Minneapolis Comm. Dev. Agency v. Lake Calhoun Assoc., 928 F.2d 299, 301 (8th Cir. 1991) (quoting *Atlas Pile Driving Co. v. Dicon Fin. Co.*, 886 F.2d 986, 989 (8th Cir. 1989)); *McAnally v. Gildersleeve*, 16 F.3d 1493, 1496 (8th Cir.1994).

In contrast, concerning motions for new trial under Federal Rule of Civil Procedure 59, the court *in Pence* observed:

> With respect to motions for new trial on the question of whether the verdict is against the weight of the evidence, we have stated: "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain a verdict.' " *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir. 1984) (citation omitted). Similar language appears in *Brown*, 755 F.2d at 671-73; *Slatton [v. Martin K. Eby Const. Co., Inc.]*, 506 F.2d [505] at 508 n. 4 [(8th Cir.1974)]; *Bates [v. Hensley]* 414 F.2d [1006] at 1011 [(8th Cir.1969)], and early authority cited in *Bates*. *See also Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1266 (8th Cir.), *cert. denied*, 484 U.S. 855, 108 S.Ct. 161, 98 L.Ed.2d 116 (1987). These cases establish the fundamental procedures or methodology to be applied by the district court in considering new trial motions and are in contrast to those procedures governing motions for j.n.o.v.

Id. at 780. With these principles in mind concerning the standards for post trial motions under Federal Rule of Civil Procedure 50 and 59, the court turns to the merits of National Fidelity's motions.

C. National Fidelity's Challenge to Chadima's Recovery Under the Theory of First-Party Bad Faith

1. Introduction and Overview of First-Party Bad Faith Under Iowa Law

National Fidelity's challenge to Chadima's recovery on their first-party bad faith theory arises principally from their assertion that, under any view of the facts, National Fidelity could not have committed first-party bad faith as a matter of law. This is premised on National Fidelity's view that even if they were wrong in initially failing to pay the greater amount under the original policy issued to George Milton Chadima, their initial denial was "fairly debatable". Under well settled Iowa principles of first-party bad faith, if a claim is "fairly debatable" then, by definition, first-party bad faith does not exist. In order to address National Fidelity's argument, in the context of the present State of Iowa law concerning first-party bad faith, an analysis and overview of Iowa law regarding first-party bad faith is helpful.

The tort of first-party bad faith resulting from an insurer's refusal to settle a first-party insurance claim with an insured was first recognized by the California Supreme Court. In *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973), an insured brought an action against his insurers and others, alleging bad faith in the denial of payment on three fire insurance policies. The California Supreme Court held:

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> [I]n every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is immanent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

Id. at 575, 108 Cal.Rptr. at 486, 510 P.2d at 1038.

The Iowa Supreme Court has recognized that an insurer may be responsible for the tort of first-party bad faith in certain situations where the insurer disputes the insured's right to recover under an insurance policy.[10] *North Iowa State Bank v. Allied Mut.*

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10. The Iowa Supreme Court noted in *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988), that a majority of the jurisdictions recognize first-party bad faith claims. *Dolan*, 431 N.W.2d at 791. The court pointed out that the following jurisdictions had recognized the tort of first-party bad faith:

> *Chavers v. National Sec. Fire & Casualty Co.*, 405 So.2d 1 (Ala.1981); *United Serv. Auto Ass'n v. Werley*, 526 P.2d 28 (Alaska 1974); *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981); *Aetna Casualty & Sur. Co. v. Broadway Arms Corp.*, 281 Ark. 128, 664 S.W.2d 463 (1984); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973); *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo.1985); *Grand Sheet Metal Prod. Co. v. Protection Mut. Life Ins. Co.*, 34 Conn. Supp. 46, 375 A.2d 428 (1977); *Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848 (1986); *St. Paul & Marine v.*

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Ins. Co., 471 N.W.2d 824, 828 (Iowa 1991); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W.2d 857, 861 (Iowa 1991); *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 12 (Iowa 1990); *Kirk v. Farm & City Ins. Co.*, 457 N.W.2d 906, 910-11 (Iowa 1990); *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790, 794 (Iowa 1988).

Prior to recognizing first-party bad faith claims, the Iowa Supreme Court had recognized a third-party bad faith cause of action for an insurer's representation of an insured in a third-party liability claim. *See Pirkl v. Northwestern Mut. Ins. Ass'n*, 348 N.W.2d 633, 635 (Iowa 1984); *Wierck v. Grinnell Mut. Reinsurance Co.*, 456 N.W.2d 191, 194-95 (Iowa 1990);

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Cumiskey, 204 Mont. 350, 665 P.2d 223 (1983); *United States Fidelity & Guar. Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975); *State Farm Gen Ins. Co. v. Clifton*, 86 N.M. 757, 527 P.2d 798 (1974); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins.*, 279 N W.2d 638 (N.D. 1979); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315 (1983); *Christian v. American Home Assurance Co.*, 577 P.2d 899 (Okla.1978); *Bibeault v. Hanover Ins.*, 417 A.2d 313 (R.I.1980); *Nichols v. State Farm Mut. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983); *Anderson v. Continental Ins. Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978).

Id. at 791 n. 1. Several other jurisdictions have recognized the tort of first-party bad faith: *Pickett v. Lloyd's*, 131 N.J. 457, 621 A.2d 445 (1993); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo.1990); *Weerns v. American Sec. Ins. Co.*, 486 So.2d 1222 (Miss. 1986); *Dailey v. Integon Gen. Ins. Co.*, 75 N.C:App. 387, 331 S.E.2d 148, *review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985); *Gibson v. National Ben Franklin Ins. Co.*, 387 A.2d 220 (Me. 1978).

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Kooyman v. Farm Bureau Mut. Ins. Co., 315 N.W.2d 30, 34-37 (Iowa 1982). The court's reasoning is that an insurer, in handling a claim for in excess of policy limits, owes a fiduciary duty to the insured to act responsibly in settlement negotiation to prevent exposure of the insured to unreasonable risk. *Wierck*, 456 N.W.2d at 194-95. The insurer owes a duty to its insured to investigate the claim and take such affirmative action as is necessary to protect the insured's interests. *Pirkl*, 348 N.W.2d at 635. In both first-party and third-party situations, the duty of good faith arises out of the insurance contract and runs from the insurer to the insured. In a third-party bad faith case, the issue is whether the insurer acted in bad faith toward the insured by failing to settle a third-party's claim within policy limits. *See Kooyman*, 315 N.W.2d at 34-37. In a first-party bad faith claim, however, the issue is whether the insurer is guilty of bad faith in failing to pay the insured's own claim.[11] *See Dolan*, 431 N.W.2d at 792.

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11. In *Dolan*, the Iowa Supreme Court set out the following reasons cited by other courts for adopting the first-party bad faith tort:

> "1. Without the tort, "an insurance company can arbitrarily deny coverage and delay payment of a claim" to its insured "with no more penalty than interest on the amount owed;"
>
> 2. Due to the "uneven bargaining power between an insured and its insurer, the insured needs the extra leverage the tort of bad faith would provide to even the positions;"
>
> 3. "Insurance contracts are contracts of adhesion;"
>
> 4. The bad faith tort "is justified because of the nature of the insurance industry, which is imbued with the public interest;"

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Under Iowa law, in order to establish a cause of action against an insurance carrier for bad faith conduct relating to a claim made by its insured, a plaintiff must first show the absence of a reasonable basis for denying benefits of the policy. *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W.2d 657, 661 (1993); *Dolan*, 431 N.W.2d at 794 (citing *Anderson v. Continental Ins.* Co., 85 Wis.2d 675, 691, 271 N.W.2d 368, 376 (1978)). In addition, plaintiff must show that defendant denied its insured's claim "knowing or having reason to know that its denial was without reasonable basis." *Wetherbee*, 508 N.W.2d at 661-62; *See Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 253 (Iowa 1991); *Kiner*, 463 N.W.2d at 13. "A reasonable basis to deny a claim exists when the claim is fairly debatable."[12]

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5. An insured is often "suffering from physical injury or economic loss when bargaining with the insurance company" and hence "the vulnerable position justifies the additional remedy of a bad faith cause of action;"

6. "The recognition of the bad faith tort in third-party situations justifies its recognition in first-party situations;" and

7. "When an insured purchases insurance, she is purchasing more than financial security; she is purchasing peace of mind," and "therefore, the extra remedy of bad faith is needed to insure she receives the benefit of her bargain."

Dolan, 431 N.W.2d at 791 (quoting Phelan, *The First Party Dilemma: Bad Faith or Bad Business?*, 34 Drake L.Rev. 1031, 1035-36 (1985-86)) (citing *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 917-19, 611 P.2d 149, 152-53 (1980)).

12. In *Dolan*, the Iowa Supreme Court adopted the "fairly debatable"

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Wetherbee, 508 N.W.2d at 662; *See Reuter*, 469 N.W.2d at 254. Less than two months prior to the trial of this matter, the Iowa Supreme Court determined that: "[w]hether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law." *Wetherbee*, 508 N.W.2d at 662.

2. *Was Chadima's Claim "Fairly Debatable" By National Fidelity?*

Both in informal discussions with counsel during the jury trial and at the formal recorded instruction conference, pursuant to Federal Rule of Civil Procedure 51, counsel for the parties and the court engaged in extensive discussion about whether the court should decide as a matter of law whether Chadima's claim was "fairly debatable" by National Fidelity. At all times throughout this process, the court maintained the position that, based on the recently decided Iowa Supreme Court decision in *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W.2d 657, 661 (1993), the court should determine, as a matter of law, whether Chadima's

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standard that the Wisconsin Supreme Court first employed in *Anderson*, 85 Wis.2d 675, 271 N.W.2d at 376. *Dolan*, 431 N.W.2d at 794. In *Anderson*, the Wisconsin Supreme Court pointed out that in a prior decision, *Drake v. Milwaukee Mut. Ins. Co.*, 70 Wis.2d 977, 236 N.W.2d 204, 207 (1975), the court had not recognized a claim for bad faith because "it was not a case 'where the validity of the claim was not even fairly debatable.'" *Anderson, 85* Wis.2d 675, 271 N.W.2d at 376 (quoting *Drake*, 70 Wis.2d at 984, 236 N.W.2d at 208). From this basis, the Wisconsin court went on to extrapolate that:

> "It is thus apparent from *Drake* that when a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law."

Id., 271 N.W.2d at 376.

claim was fairly debatable by National Fidelity. This created a dilemma for the trial court. If the court believed Chadima's claim was fairly debatable, then, under well established first-party bad faith principles of Iowa law, there could be no first-party bad faith and the claim should not be submitted to the jury.[13] If the claim was going to be submitted to the jury, then the court believed it should instruct on the second element of first-party bad faith that there was no reasonable basis for denying the claim as a matter of law. Thus, the court proposed the following jury instruction no. 17:

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13. However, the court believed the better practice was to submit the first party bad faith claim to the jury and address the issue in post trial motions. In *Dace v. ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983), the Eighth Circuit noted:

> This case illustrates again that it is usually better practice for a district court, faced with motion for directed verdict, to allow the case to go to the jury and address the issue by way of judgment n.o.v. if necessary. The jury may find for the moving party, in which case the issue disappears. If the verdict is against the moving party and if judgment n.o.v. is granted, and if this Court decides on appeal that it should have been denied, the verdict can simply be reinstated and no new trial is necessary.

Id. at 379 n. 9; *see also Dale v. Janklow*, 828 F.2d 481, 484 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014, 108 S.Ct. 1486, 99 L.Ed.2d 714 (1988); *United States Philips Corp. v. Windmere Corp.*, 861 F.2d 695, 705 (Fed.Cir.1988), *cert. denied sub nom. North American Philips Corp. v. Windmere Corp.*, 490 U.S. 1068, 109 S.Ct. 2070, 104 L.Ed.2d 635 (1989); *Mattivi v. South African Marine Corp., "Huguenot"*, 618 F.2d 163, 166 n. 2 (2d Cir.1980). This was particularly true where, here, all of the trial witnesses were called in Chadima's case in chief and the Federal Rule of Civil Procedure 50 motions for judgment as a matter of law were made after all of the evidence was submitted. From a trial management prospective, this procedure made the most sense because the trial evidence had already been received by the jury. The only remaining portions of the trial were the final instructions and closing arguments.

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PROPOSED JURY INSTRUCTION NO. 17
Bad Faith

Plaintiffs have alleged that Defendant should be held liable under the theory; of bad faith. In order to establish bad faith on behalf of the Defendant, Plaintiffs must prove all of the following propositions:

1. The Defendant denied Plaintiffs' claim.

2. There was no reasonable basis for denying the claim. The court instructs you on this second proposition that, as a matter of law, there was no reasonable basis for denying the claim. In other words, this proposition has already been proven and established by the Plaintiffs.

3. The Defendant knew or had reason to know that there was no reasonable basis for denying the claim.

4. The denial was a proximate cause of damage to the Plaintiffs.

5. The nature and extent of damage.

If the Plaintiffs have failed to prove any of these propositions, the Plaintiffs are not entitled to these damages. If the Plaintiffs have proved propositions 1, 3, 4 and 5 (the court has already determined that the Plaintiffs proved proposition

> 2), then you should determine what damages, if any, the Plaintiffs are entitled to.

Counsel for both Chadima and National Fidelity objected to this instruction. Chadima's counsel asserted that the jury, as the trier of fact, should decide this element of the instruction Counsel for National Fidelity argued that the court should decide, as a matter of law, that there was no first-party bad faith and, therefore, not submit the first-party bad faith theory to the jury. Failing that, counsel for National Fidelity argued that the court should not give proposed instruction no. 17, but, rather, should submit the issue of whether there is a reasonable basis for denying the claim to the jury.

After lengthy discussion and analysis, both informally and at the formal Rule 51 instruction conference, the court reluctantly agreed to let the jury decide the second element of first-party bad faith that is whether there was a reasonable basis for denying the claim — and to reserve final judgment on the question until post trial motions. Thus, the following jury instruction no. 17 was given by the court on the first-party bad faith issue:

JURY INSTRUCTION NO. 17
Bad Faith

> Plaintiffs have alleged that Defendant should be held liable under the theory of bad faith. In order to establish bad faith on behalf of the Defendant, Plaintiffs must prove all of the following propositions:
>
> 1. The Defendant denied Plaintiffs' claim.
>
> 2. There was no reasonable basis for denying the claim.

> 3. The Defendant knew or had reason to know that there was no reasonable basis for denying the claim.
>
> 4. The denial was a proximate cause of damage to the Plaintiffs.
>
> 5. The nature and extent of damage.
>
> If the Plaintiffs have failed to prove any of these propositions, the Plaintiffs are not entitled to these damages. If the Plaintiffs have proved all of these propositions, you must determine whether the Plaintiffs are entitled to damages and, if so, the amount.

Neither party objected to the giving of jury instruction no. 17. However, National Fidelity objected during the Rule 51 conference and in its Rule 50 motion for judgment as a matter of law, and in its post trial motions pursuant to Rules 50 and 59 that, as a matter of law, Chadima's claim was fairly debatable and the issue should not have been submitted to the jury.

In light of instruction no. 17 as actually given, the court has no problem concluding there was substantial evidence to support the jury's finding that there was no reasonable basis for denying the claim.[14] This is especially true in light of the standard required

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14. In this regard, if instruction no. 17 was correct (which the court does not believe it was because of the language in the *Wetherbee* case that "whether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law" *Wetherbee,* 508 N.W.2d at 662) the court believes a jury verdict either for or against Chadima would have been supported by substantial evidence. That is because the evidence produced at trial was substantial on both sides of the

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under Federal Rule of Civil Procedure 50 that the evidence be considered in the light most favorable to Chadima, assume the jury resolved all conflicts of evidence in favor of Chadima, assume as true all facts which Chadima's evidence tended to prove, and giving Chadima the benefit of all favorable inferences which may be reasonably drawn from the facts. *See Minneapolis Comm. Dev. Agency v. Lake Calhoun Assoc.*, 928 F.2d 299, 301 (8th Cir.1989) (citing *Atlas Pile Driving Co. v. Dicon Fin. Co.*, 886 F.2d 986, 989 (8th Cir.1989); *McAnally v. Gildersleeve*, 16 F.3d 1493, 1496 (8th Cir.1994). It would also be true under the Rule 59 standard for new trial. *Pence*, 961 F.2d at 780.

Thus, if the court correctly instructed the jury in instruction no. 17, the court would not set aside the verdict under Federal Rule of Civil Procedure 50 because the court believes there was substantial evidence to support the jury's finding that there was no reasonable basis for denying the claim.

On the other hand, if the Iowa Supreme Court meant what it said in *Wetherbee* that "[w]hether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law", *Wetherbee*, 508 N.W.2d at 662, the court must conclude that Chadima's claim was fairly debatable by National Fidelity. Notwithstanding the court's view that there is substantial evidence for the jury to conclude that there was no reasonable basis for denying the claim, the court's understanding of the evidence compels the conclusion that the claim was fairly debatable as a matter of law. It is true that the initial claims examiner, Catherine Bicknell White, concluded Chadima was entitled to the greater amount under the original policy. However,

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question of whether there was a reasonable basis for denying the claim and therefore, whether the claim was fairly debatable.

under the court's view of the evidence, there was a reasonable basis for Ms. Perrine and Mr. Burkett to disagree with that initial assessment. Moreover, once Ms. White heard Ms. Perrine's rationale she agreed with it. Admittedly, the company's computer records and written records were at odds with each other concerning the validity of the original policy. National Fidelity was, however, entitled to fairly debate the merits of Chadima's claim. Neither Ms. Perrine nor Mr. Burkett had faced this Specific situation before and, thus, there was no clear company policy or precedent (legally or factually) to immediately and definitively resolve their questions. National Fidelity even had, as it urged in its post trial brief, "a right to be wrong in this case. . . ."[15] Chadima strongly argues in its brief that *Wetherbee* either really doesn't mean what it says or, in the alternative, is distinguishable from this case on the question of whether the court should determine that the claim was fairly debatable as a matter of law. Chadima argues as follows in its brief:

> This case is in stark contrast to the situation in *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W.2d 657 (Iowa 1993) which: is relied upon by Defendant. In *Wetherbee*, two *legal* issues were involved. The first involved the question of whether an insured was entitled to recover under insurance motorist benefits from her insurance company when she had no right to bring the action in her own name against the company and the time for opening an estate had expired. The second involved the question of whether Plaintiff could establish bodily injury under the policy. A

15. Def. Brief in Support of Renewed Motion for Judgment as a Matter of Law or in the Alternative, For New Trial filed Feb. 4 1994, p. 4.

review of the Court's opinion shows the factual issues were not contested, but the legal effect of the stipulated facts was at issue. Consequently, the Court summarily dismissed the bad faith claim. In this case, Defendant has raised no legal questions as to its obligation to pay under the policy. Rather what is involved is a question of *fact* as to the reasonableness of their actions given their knowledge at the time the claim was denied. This matter was resolved by the jury against the Defendant and that verdict must stand since it is supported by substantial evidence. E.g. *Nassen v. National States Ins. Co.*, 494 N.W.2d 231, 236 (Iowa 1992); *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 12 (Iowa 1990).[3]

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3. The language relied upon by Defendant from *Wetherbee is,* at best, dicta. Reviewing the case in its entirety it is clear that the dispute in *Wetherbee* was the legal conclusion to be drawn from the stipulated facts, i.e., whether Plaintiff could assert a consortium claim (which had to be asserted by the estate) when the time for opening the estate had expired. Since there was no *factual* dispute, it was appropriate for the district court to summarily decide the matter. However, where there *is* a factual dispute, it is still the law of this state that a jury should properly decide the matter.

Further evidence that the language is dicta is the fact that the *Wetherbee* court made no effort to explain its radical and abrupt departure from *Nassen* and *Kiner* and its earlier decisions. It is inconceivable that the Supreme Court would give such cursory treatment to such an extreme change of position.

Appendix C

Pl. Resistance to Def. Post Trial Motions, filed Mar. 9, 1994, pp. 12-13, n. 3.

Notwithstanding Chadima's interpretation of the *Wetherbee* decision,[16] this court believes it must apply its plain and clear meaning.[17] That is, that the court must decide as a matter of law whether the underlying claim was fairly debatable and that it is impermissible to submit that question to the jury. The court finds that the trial evidence supports National Fidelity's position that Chadima's claim was fairly debatable and, therefore, grants National Fidelity's Rule 50 motion.[18] This determination that

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16. Chadima could have but did not ask this court to certify the question of the proper interpretation of the statement in *Wetherbee* about the court determining the fairly debatable standard as a matter of law to the Iowa Supreme Court. *See* Local Court Rule 23 entitled "Certified Question of Law" and Iowa Code ch. 684A entitled "Questions of Law in Supreme Court Certified".

17. There is some merit in Chadima's challenge to the language in *Wetherbee* that "[w]hether a claim is fairly debatable in a given situation is appropriately decided by the court as a matter of law." *Wetherbee*, 508 N.W.2d at 662. "As with most meritorious issues, there is an element of truth in each of the parties' conflicting contentions," *Smith v. Printup*, 866 P.2d 985, 992 (Kan. 1993). This court is troubled by the fact that there is no explanation in *Wetherbee* as to why the court should decide the fairly debatable question as a matter of law. After all, whether a claim is fairly debatable depends upon whether there is a reasonable basis to deny the claim. *Wetherbee*, 508 N.W.2d at 662; *Reuter*, 469 N.W.2d at 254. This court does not understand why determining reasonableness in the context of a first-party bad faith cause of action is for the court yet determining reasonableness in the context of whether a person is negligent is for the trier of fact. *See* Iowa Uniform Civil Jury Instruction 700.2 where "negligence" is defined as "something a reasonably careful person would not do under similar circumstances. . . ."

18. It would be inappropriate to grant National Fidelity's Rule 59 motion. A new trial is not required because the court has ruled that as a matter of law under Rule 59, Chadima's claim to National Fidelity was fairly debatable and, therefore, there can be no first party bad faith.

Chadima's claim was fairly debatable by National Fidelity renders moot Chadima's motion for entry of judgment on the punitive damage question as well as the State of Iowa's motion for judgment entry.[19]

D. National Fidelity's Challenge to Chadima's Recovery Under Breach of Contract

National Fidelity argues that "[t]here has been no evidence presented as to the terms of the contract, and there has been no evidence that any of the terms of the contract were even [sic] breached."[20] Again, in order to resolve National Fidelity's argument, a basic overview of Iowa contract law is necessary.

"In a breach of contract claim, the complaining party must prove 1) the existence of a contract, 2) the terms and conditions of the contract, 3) that it has performed all of the terms and conditions required under the contract, 4) the defendant's breach of the contract in some particular way, and 5) that plaintiff has suffered damages as a result of the breach." *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993)

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19. Chadima argued both in the Rule 51 instruction conference and in its Rule 50 motion at trial and post trial that there was no evidence in the record supporting the jury's answer to the special interrogatory that the conduct of National Fidelity was not directed specifically at Chadima. Because the granting of National Fidelity's trial and post trial motions on the question of first party bad faith renders the punitive damages questions moot, the court need not enter and decide the most interesting and very close question of whether the jury properly answered the special punitive damage interrogatory.

20. Def. Brief in Support of Its Renewed Motion for Judgment as a Matter of Law, or in the Alternative, For New Trial, filed Feb. 4, 1994, p. 10.

(citing *Berryhill v. Hatt*, 428 N.W.2d 647, 652 (Iowa 1988)).

Under Iowa law, "[t]he essential elements of a contract include communication of an offer and acceptance in a manner specified or required by law." *Desy v. Rhue*, 462 N.W.2d 742, 746 (Iowa Ct.App.1990). In order for a contract to be binding, it must be definite and certain as to its terms to enable the court to give it an exact meaning. *Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa Ct.App.1987); *see Palmer v. Albert*, 310 N.W.2d 169, 172 (Iowa 1981); *Davis v. Davis*, 261 Iowa 992, 1001, 156 N.W.2d 870, 876 (1968).

"It is the cardinal principle of contract construction that the parties' intent controls; and except in cases of ambiguity, this is determined by what the contract itself says." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991). As the Iowa Supreme Court pointed out in *Black & Veatch:*

> The construction of a contract, the legal effect of the contract, is always a matter for the court. *Connie's Constr. v. Fireman's Funds Ins.*, 227 N.W.2d 207, 210 (Iowa 1975). Interpretation, the meaning of contractual words, is also an issue for the court unless it is dependent upon extrinsic evidence or upon a choice among reasonable inferences from the extrinsic evidence. *Id.* Extrinsic evidence is admissible as an aid to interpretation when it throws light on the parties' situation, antecedent negotiations, the attendant circumstances, and the objectives the parties were trying to attain.

Appendix C

> *Taylor Enter., Inc. v. Clarinda Prod. Credit Ass'n*, 447 N.W.2d 113, 115 (Iowa 1989). Generally, questions of performance or breach are for the jury. *Id.* at 116.

Black & Veatch, 497 N.W.2d at 825.

In *Wickham & Burton Coal Co. v. Farmers Lumber Co.*, 189 Iowa 1183, 1185, 179 N.W. 417, 418 (1920), the Iowa Supreme Court declared that: "[W]hatsoever is ascertainable with reasonable effort is sufficiently certain to be enforced . . ." In *Severson v. Elberon Elevator, Inc.*, 250 N.W.2d 417, 420 (Iowa 1977), the court went on to declare that: "(Contract) terms are sufficiently definite if the court can determine with reasonable certainty the duty of each party and the conditions relative to performance." Courts should be slow to hold a contract unenforceable for uncertainty and must take every effort to avoid such a result. *Palmer v. Albert*, 310 N.W.2d 169, 172 (Iowa 1981). In interpreting the meaning of contracts, courts seek "to give effect to the intention of the parties in conformity with a reasonable application of the circumstances under which the instrument was executed." *First Nat'l Bank in Creston v. Smith*, 331 N.W.2d 120, 122 (Iowa 1983); *see Miller v. Geerlings*, 256 Iowa 569, 576-77, 128 N.W.2d 207, 213 (1964); *Darnall v. Day*, 240 Iowa 665, 670-71, 37 N.W.2d 277, 280 (1949).

" 'Under Iowa law, when a contract has been breached, the innocent party is generally entitled to be placed in a position he would have occupied had there been performance.' " *Metropolitan Transfer Station, Inc. v. Design Structures, Inc.*, 328 N.W.2d 532, 535 (Iowa Ct.App.1982) (quoting *Lokota Girl Scout Council, Inc. v. Havey Fund-Raising Management, Inc.*,

519 F.2d 634, 639-40 (8th Cir.1975)). An important corollary to the general rule is that a party seeking damages for a breach of contract has a duty to mitigate its damages. *DeWaay v. Muhr,* 160 N.W.2d 454, 456 (Iowa 1968). The defnese of mitigation, however, must be both pled and proven by the asserting party. *Iowa Power & Light Co. v. Board of Water Works Trustees,* 281 N.W.2d 827, 833 (Iowa Ct.App.1979). The defense of failure to mitigate damages precludes an award of those damages which plaintiff could have been avoided by taking "reasonable efforts." *See Welter v. Humboldt County,* 461 N.W.2d 335, 340 (Iowa Ct.App.1990); *Shewry v. Heuer,* 255 Iowa 147, 154, 121 N.W.2d 529, 533 (1963).[21]

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21. The court instructed the jury in this case on National Fidelity's affirmative defense of mitigation as follows:

JURY INSTRUCTION NO. 26
Mitigation of Damages

You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages — that is, to take advantage of any reasonable opportunity they must have had under the circumstances to reduce or minimize the loss or damage.

So, if you should find that the Defendant has proved by a preponderance of the evidence that the Plaintiffs have failed to seek out or take advantage of an opportunity that was reasonably available to them under all of the circumstances shown by the evidence, then you should reduce the amount of their damages by the amount they could have reasonably realized if they had taken advantage of said opportunity

Appendix C

The court notes that neither Chadima nor National Fidelity introduced the actual insurance contract into evidence. Nonetheless, the court believes there was sufficient evidence to support the jury's verdict on the breach of contract claim. The jury could have found that National Fidelity did not pay the amount due under the original insurance contract within a reasonable period of time. Also, the jury could have found under the trial evidence that National Fidelity failed to tender to the Plaintiffs additional interest due from the time the checks were issued until National Fidelity instructed the Plaintiffs that they could cross out the release language. Moreover, the jury could have found under the evidence that National Fidelity failed to carry its burden of persuasion on their affirmative defense of mitigation. While the court would have found, sitting as a trier of fact, that the Plaintiffs failed to mitigate damages by failing to cash the checks after having been given oral permission to do so, the court is unwilling to substitute its own judgment for that of the jury. The jurors heard both sides of the evidence on the question of mitigation and found for the Plaintiffs.[22]

Because there is substantial evidence to support the jury's verdict for Chadima on the breach of contract claim, National Fidelity's Rules 50 and 59 motions are denied.

VI. *CONCLUSION*

The jury's verdict that National Fidelity committed first-party bad faith in its handling of Chadima's insurance claims

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22. One might fairly inquire why the court is unwilling to substitute its own judgment for that of the jury on the question of mitigation but was willing to do so on the question of first party bad faith. The answer to this apparent contradiction is simple. The court understands the *Wetherbee* decision to compel the trial judge to make the decision of whether Plaintiffs' claim is fairly debatable as a matter of law.

must be set aside because, as a matter of law, Chadima's claim was fairly debatable by National Fidelity. Because the $100,000.00 in punitive damages was awarded on Chadima's first-party bad faith claim, the judgment entered on January 24, 1994 is modified to delete the $100,000.00 punitive damage award. Thus, the State of Iowa's potential interest in 75 percent of the punitive damage award, authorized by Iowa Code § 668A.1(2)(b), is moot. Likewise, Chadima's trial and post trial motions seeking to overturn the jury's special interrogatory finding that National Fidelity's conduct was not directed specifically at Chadima is also moot.

The court rejects National Fidelity's argument that there was insufficient evidence to support the jury's award of $34,029.00 in compensatory damages. Therefore, National Fidelity's trial and post trial motions seeking to overturn the jury's breach of contract award are denied. The judgment entered on January 24, 1994 in the amount of $34,029.00 in compensatory damages is affirmed.

One final point. This case was exceptionally well prepared, tried before the jury, and briefed and argued on post trial motions by Keven H. Collins for Chadima and Thomas J. Shields for National Fidelity. The same is true of Iowa Assistant Attorney General Richard E. Mull's handling of the State of Iowa's intervention and interest in the punitive damage award. While this case was zealously litigated by counsel, they, at all times, displayed the utmost professionalism and are commended by the court for their exemplary handling of this litigation.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

No. 95-166

In The

Supreme Court of the United States

October Term, 1995

NATIONAL FIDELITY LIFE INSURANCE COMPANY,
Petitioner,

vs.

GEORGE W. CHADIMA, TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; SWISHER TRUST & SAVINGS BANK, AS TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; GEORGE W. CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA; LILLIAN ESTHER CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA,
Respondents,

-and-

STATE OF IOWA, CIVIL REPARATIONS TRUST FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Iowa Supreme Court has recognized the intentional tort of first-party bad faith in the insurance context. One of the elements a plaintiff must prove in order to recover is that no reasonable basis for denying the claim existed. Whether a reasonable basis for denying the claim existed is measured by an objective standard and is decided by the court where no factual issue exists. However, when, as here, a factual dispute exists the matter is properly decided by the jury. Here, the Court of Appeals for the Eighth Circuit properly applied Iowa law. The question presented is whether this court should exercise its discretionary certiorari jurisdiction to review the application of state law to the facts of this case.

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Respondents,

-and-

STATE OF IOWA, CIVIL REPARATIONS TRUST FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent believes that only issues of Iowa law are presented and no federal, constitutional or other questions are presented by the petition.

STATEMENT OF THE CASE

The petition raises no questions, fundamental or otherwise, regarding the Erie Doctrine but rather involves only a question of whether Eighth Circuit Court of Appeals properly interpreted and applied Iowa law to the facts of this case.

A. Statement of the Facts

Since Petitioner alleges that the decision of the Eighth Circuit was "unreasonable" or "clearly erroneous", a more detailed Statement of Facts is required to frame the issue than supplied by Petitioner.

Chadima contends that National Fidelity Life Insurance Company ("National Fidelity") intentionally tendered less money than its own records showed it owed on a death claim, intending to short change the beneficiary. To the extent that National Fidelity suggests in its Statement of Facts that a conflict between the policy and the change request form used by Chadima existed, it is both irrelevant and misleading since National Fidelity has never suggested that the conflict formed the basis for denying the claim. This supposed basis for denying the claim was raised for the first time on appeal by The American Council of Life Insurance in an amicus curiae brief and was not considered by the Court of Appeals since the policy was not in evidence. *Chadima v. National Fidelity*, 55 F.3d 345, 348 n.7 (8th Cir. 1995).

In January of 1986, National Fidelity issued a declining death benefit policy insuring the life of George Milton Chadima. This was not the coverage Mr. Chadima desired so he requested that National Fidelity convert the policy to a fixed death benefit policy of $100,000. National Fidelity refused, indicating that it would issue a new fixed death benefit policy with a death benefit of $90,000 if Chadima returned his policy to the company with an executed Policyowner Request Form.

Chadima forwarded the insurance policy and the executed Policyowner Request Form to National Fidelity as directed. The Policyowner Request Form clearly indicated that the change would not be effective until approved in writing by the company.

Chadima died on October 26, 1989 before the policy had been changed or re-issued by National Fidelity. On the date of death, the policy had a face value of $134,973.20.

Chadima's Estate filed a timely claim. When the claim was received, the requested change had not been acted upon according to National Fidelity's records. The claims manager, Jan Perrine, reviewed the file and referred it to Catherine White, a claims examiner, for National Fidelity. White reviewed the claim and the company file and determined that $136,692.72 was due under the policy. In addition to reviewing the written file, White reviewed the company's computerized records which clearly showed the original policy was still in effect. White recalls seeing Chadima's completed Policyowner Request Form which requires that the original policy be surrendered with the application and provides, "It is further agreed following completion of such requirements *the requested changes shall not take effect until approved in writing by the company*" when she reviewed the file. (emphasis added). It was clear to White that no written company approval of the change was in the file. Further, in her experience with processing claims, White believed there should be an

endorsement signed by a company officer in the file in order for a policy change to be effective. No endorsement was in the file. Consequently, after her review of the file, it was White's opinion that the policy had not been changed and that $136,000 was due under the policy. White prepared a worksheet called a Claim Review Form and requested a check for $136,692.72. Claims Manager Perrine reviewed the request for $136,692.72 and declined approval. She instructed Ms. White to alter the Claim Review Form and to request payment as though the policy had been changed. When Claims Manager Perrine decided to pay less than was owed, portions of the form were whited-out at Perrine's direction.

It is undisputed that the Policyowner Request Form, indicating the change was not effective until approved in writing by the company, was in the file prior to issuance of the first check for $91,423.97, which would have been the amount due had the policy been changed. It is also undisputed that no evidence existed to suggest National Fidelity acted upon the change request prior to Chadima's death. In fact, all evidence indicated the change had *not* been made.

Further, National Fidelity concealed the above facts from Chadima and no one from National Fidelity made any attempt to contact the estate to determine if Mr. Chadima had received confirmation of the change prior to his death.

Claims Manager Perrine admitted that the Policy Change Department of National Fidelity informed her, prior to issuance of the first check, that the policy had not been changed prior to Chadima's death. Likewise, Claims Manager Perrine was aware that no written approval of the change to Mr. Chadima's policy was made prior to his death, nor had the terms of the form required by the company to change a policy been complied with. On January 11, 1990 she tendered a check in the amount of

$91,423,97 in full payment of death benefits under the policy when she and others in the company knew the company actually owed in excess of $136,000.

National Fidelity *never* asserted that it underpaid the claim on the basis of the language of the policy making the change effective upon receipt of the change request.

After receiving the January 11, 1990 letter with a check for less than the amount due, counsel for Chadima wrote White on January 16, 1990 requesting full payment or an explanation of the reason for the denial. White turned the matter over to her boss, Claims Manager Perrine. Claims Manager Perrine responded to Chadima's attorney's January 16 letter on February 2, 1990 avoiding the questions raised in the January 16 letter and merely listed the contents of the file.

Finding Claims Manager Perrine's February 2, 1990 response unsatisfactory, Chadima's attorneys wrote to Perrine on February 7, 1990 requesting that she respond to several specific questions regarding whether, and if so when, the policy had been changed, and asking her to supply a copy of the reissued policy and an explanation of why Mr. Chadima had not been notified of the alleged change.

Upon receipt of the February 7, 1990 letter, a claims supervisor by the name of Ms. Cherry, reviewed the file for the first time. Like Claims Examiner White, Ms. Cherry concluded that the policy had never been changed. It was equally clear to Ms. Cherry that Chadima's attorneys were aware of Claims Manager Perrine's concealment and deception. Realizing the very serious nature of Claims Manager Perrine's improper actions, Cherry wrote to associate general counsel Burkett: "Please advise – do we pay the additional money or what? Policy was not re-issued prior to death –". Attorney Burkett responded,

"PAY ASAP – the add. amount & put *release* lang on back of check. Send to atty & say "we could not find **additional** written approval by Co. we thought we had so (decrease) did not take effect.".

At trial, Attorney Burkett admitted that he based his initial decision to pay less than the amount due primarily upon the fact the policy was not in the file, yet he made no effort to ascertain its whereabouts. In other words, the associate general counsel of National Fidelity participated in and ratified a decision to pay less than was due on a policy knowing he had no support for the position he was taking; when his claims manager was aware the file clearly indicated the policy had not been changed and the claims manager had actually been told that the change was not made before the death of the policyholder.

On February 22, 1990, National Fidelity forwarded a check for the balance of $46,000 without responding to any of the questions in Chadima's attorney's February 7, 1990 letter, but followed Burkett's instruction to deceive the beneficiary by referring to the fictitious "additional" written approval.

Given that, Chadima believed that National Fidelity had been less than candid on at least three occasions (*i.e.*, each time National Fidelity had communicated with the Estate regarding the payment of the death benefits), Plaintiffs insisted on a written agreement to allow them to negotiate the checks tendered by National Fidelity without waiving their right to pursue claims against National Fidelity in their handling of this claim for benefits.[1] While National Fidelity claimed it was willing to allow Chadima to cross out the release language on the check, it refused

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1. The checks contained release language which Chadima's believed might release claims the Estate had against the company for its conduct in processing the benefit request.

to enter into a written agreement reserving Chadima's rights. In addition, the face of the checks provide they expired 120 days after issuance. Through judgment entry, National Fidelity never made an unconditional tender of the full amount due under the policy, nor had it tendered interest for the period during which it insisted on the Release.

B. Course of Proceedings

Respondent believes that Petitioner has misstated the holding of the Court of Appeals for the Eighth Circuit on page 4 of its Petition. Specifically, Petitioner characterized the holding as giving the trial court the option of deciding whether a reasonable basis exists when, in fact, the court correctly applied Iowa law which requires the jury to make this determination when a factual issue exists. *Chadima v. National Fidelity Life Ins. Co.*, 55 F.3d 345, 349-350 (8th Cir. 1995).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

Chadima believes that certiorari should be denied because only issues of Iowa law and their application to the facts of this case are presented. In addition, contrary to Petitioner's assertions, the Court of Appeals properly applied Iowa law to the facts of this action and *Salve Regina College v. Russell*, 499 U.S. 225 (1991) does not dictate otherwise. Finally, the issues presented, while important to the parties, are not significantly important to warrant certiorari since they are tied to the facts of this case and any ruling by this court might be subsequently modified by either the Iowa Supreme Court or the Iowa legislature.

II.

THE PETITION PRESENTS ONLY ISSUES OF IOWA LAW WHICH ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY CERTIORARI.

The issue presented in the Petition is fact specific to this case and turns upon whether Chadima introduced sufficient evidence to raise a jury question on the issue of whether a reasonable basis existed for denial of the claim by National Fidelity. While the issue is important to the parties, its importance to the public is minimal. This case involves no federal issues constitutional or otherwise. Likewise, no fundamental questions concerning the Erie Doctrine are implicated since the Court of Appeals clearly recognized that Iowa law controlled and properly applied Erie principals in ascertaining that law. Indeed, the Petition for Writ makes no claim to the contrary but rather alleges a violation of Erie because of National Fidelity's belief that the Appeals Court simply made a mistake. Even if Petitioner was correct in this belief, such a mistake does not provide a basis for certiorari.

Likewise, Respondent does not contend that the court lacks the power, in its discretion, to grant certiorari but only that since any decision rendered by this court could be modified or changed by either the Iowa courts or legislature, the issue presented is not of sufficient importance to warrant the grant of certiorari. Since it is the importance to the public, not the parties, which is relevant to certiorari, an issue which may have no binding effect beyond the case before the court is simply not important enough to warrant certiorari. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923).

Supreme Court Rule 10 makes it clear that review on writ of certiorari is not a matter of right but discretionary with the Court.

Only when "special and important reasons therefore" exist should the writ be granted. In *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1995), the Court stated that " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Again, the fact that the Iowa courts or the legislature have the final say upon the law in this area, makes the issue here academic at best. In addition, the predominance of factual issues makes this case inappropriate for certiorari.

Rule 10(a) is illustrative of the character of the reasons the Court will consider sufficient for granting a Petition for Certiorari from a court of appeals. In its current form, the Rule focuses upon important federal issues such as where a conflict exists between the circuits; a conflict between a federal court of appeals and a state court of last resort on federal issue; or when the court has departed from the accepted and usual course of proceedings. Here, there are simply no federal issues involved but rather only a question of state law which was properly decided by the Court of Appeals.

Equally significant here is the removal from Rule 10.1 in 1980 of the provision relating to decisions by courts of appeal resolving important state law questions in a way in conflict with state law. At least one commentator has indicated that this represents a decrease in the importance of such issues in light of the Erie Doctrine. R. Stern & E. Gressman, *Supreme Court Practice* § 4.10 p. 183 (7th Ed. 1993). Given the lack of far reaching implications of such decision and the court's limited resources absent a clear misapplication of the principals underlying the Erie Doctrine, which is not asserted here, these issues simply do not warrant review.

Petitioner attempts to overcome this hurdle by arguing that the Court of Appeals failed to follow Iowa law and this

constitutes a departure from usual judicial procedure sufficient to justify the granting of certiorari. At the outset, this argument misconceives the purpose of certiorari. Certiorari is not primarily concerned with the correction of errors by the lower courts but rather with the resolution of important and wide reaching issues of federal law. R. Stern & E. Gressman, *Supreme Court Practice* § 4.17 p. 193 (7th Ed. 1993). Of equal importance here, as discussed below, is that the Court of Appeals properly interpreted Iowa law.

III.

THE COURT OF APPEALS PROPERLY APPLIED IOWA LAW FINDING THAT SINCE CHADIMA HAD PROVIDED SUBSTANTIAL EVIDENCE THAT NO REASONABLE BASIS EXISTED FOR DENYING THE CLAIM THE ISSUE WAS PROPERLY SUBMITTED TO THE JURY IN THIS CASE.

The Iowa Supreme Court has recognized that an insurer may be held liable for the tort of first-party bad faith where it unreasonably denies or delays payment of a valid claim. *E.g., North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W. 2d 824, 828 (Iowa 1991); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W. 2d 857, 861 (Iowa 1991); *Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 12 (Iowa 1990); *Kirk v. Farm & City Ins. Co.*, 457 N.W. 2d 906, 910-11 (Iowa 1990); *Dolan v. Aid Ins. Co.*, 431 N.W. 2d 790, 794 (Iowa 1988).

To recover on a bad-faith claim, Respondent must prove by a preponderance of the evidence the absence of a reasonable basis for denial or delaying the payment of the benefits and that Petitioner knew or should have known that a reasonable basis was lacking when it denied or delayed payment. *E.g., Dirks v. Farm Bureau Mutual Ins. Co.*, 465 N.W. 2d 857 (Iowa 1991); *Central*

Life Ins. v. Aetna Cas. & Surety Co., 466 N.W. 2d 257 (Iowa 1991).

The real question here is who decides the first element when the facts are disputed. Chadima contends the issue is for the jury, and National Fidelity contends it is for the court in all cases. National Fidelity's position simply is not the law in Iowa as recognized by the Court of Appeals.

Iowa Civil Jury Instruction 1410.1 clearly contemplates the submission of the existence of a reasonable basis for denying the claim to the jury in the appropriate case. That jury instruction[2] provides in part:

> The plaintiff must prove all of the following propositions:
>
> 1. The defendant denied plaintiff's claim.
>
> 2. There was no reasonable basis for denying the claim.
>
> 3. The defendant knew or had reason to know that there was no reasonable basis for denying the claim.
>
> * * *

If the issue could never be submitted to the jury, why is paragraph 2 included? The note to the instruction may shed some light on this question. Specifically the note provides:

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2. In *Dirks v. Farm Bureau Mutual Insurance Co.*, 465 N.W. 2d 857, 860 (Iowa 1991), the Iowa Supreme Court accepted a similar instruction as a proper statement of the law.

> Element 2, the lack of a reasonable basis for denying the claim, is an objective element. This element will usually be determined by the court as a matter of law. *Reuter v. State Farm Mut. Auto Ins. Co.*, 469 N.W.2d 250, 255 (Iowa 1991).

First, the note clearly does not require this issue to always be determined by the court since it uses the word "usually".

Next, the note makes it clear that this is an objective element of the tort. Since it is an objective element, where no factual issue exists, it is properly decided by the court. However, like so many other issues which may be determined by the court where the facts are not disputed, where they are disputed the issue becomes one for the jury.

As recognized by the Court of Appeals, Chadima's view of the Iowa law is supported by at least two Iowa Supreme Court Cases. *See Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 12 (Iowa 1990); *Nassen v. National States Insurance Co.*, 494 N.W. 2d 231 (Iowa 1992), *cert.denied*, 113 S. Ct. 1846 (1993).

In *Nassen v. National States Ins. Co.*, 494 N.W. 2d 231 (Iowa 1992), the Court reaffirmed that the heart of the "fairly debatable" test requires a finding by the fact finder that the company's decision was not based on an honest and informed judgement. *Id.* at 236. Indeed, the court stated:

> The "fairly debatable" test approved in *Dolan* required plaintiff to establish to the satisfaction of *a reasonable fact finder* that National States' decision to rescind her policy was not based on an honest and informed judgment. . . . Under the circumstances, *the*

> *question of bad faith was for the jury to decide.* (Emphasis added.)

Id.

Likewise, in *Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 13 (Iowa 1990), the court affirmed the District Court's submission of issue to the jury stating:

> . . . We believe that a reasonable fact finder could find that Reliance failed to "exercise an honest and informed judgment" on Kiner's claim, and thus could conclude that its denial was not fairly debatable. *The issue was therefore one for the jury, not for the court as a matter of law.* (Emphasis added.)

Id.

The confusion in this area has been generated by a sentence in the recent decision *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W. 2d 657 (Iowa 1993). Chadima contends that *Wetherbee* did not make the extreme change in the law suggested by National Fidelity but rather *Wetherbee* is distinguishable since only *legal* issues were involved. In *Wetherbee*, the plaintiff's husband had been killed in an automobile accident, and plaintiff sought recovery for loss of consortium under the provisions of an underinsurance policy issued by defendant. When defendant denied coverage, plaintiff sued for breach of contract and bad faith. Defendant moved for summary judgment on all counts asserting that since plaintiff had no right to bring the action, the policy did not apply. Defendant also asserted that plaintiff's loss of consortium claim was not bodily injury under the policy. Finally, defendant sought dismissal of the bad-faith claim as fairly debatable. The trial court granted the motion on the first

ground without discussion of the bad faith issues, and plaintiff appealed.

The principal issue before the court in *Wetherbee* was "whether an insured is entitled to recover underinsured motorist benefits from her insurance company when the insured has no right to bring an action in her own name against the underinsured motorist." *Id.* at 658. Since the facts were not disputed, this issue involved the legal interpretation of the phrase "legally entitled to recover damages". *Id.* at 661. That was clearly a proper matter for the court.

The second issue in *Wetherbee* was whether plaintiff's claim for loss of consortium constituted "bodily injury" under the policy. Again, this presented a legal issue of whether plaintiff's claim for loss of consortium constituted "bodily injury" required for recovery under the policy. *Id.*

After finding for the plaintiff on both of the above issues, the court turned to the bad-faith claim, which had not been addressed by the trial court. The court first assumed "the [district] Court apparently determined that Economy Fire was not in bad faith *as a matter of law* because the Court dismissed Katherine's Petition in its entirety." (Emphasis added.) *Id.* The court then cited *Kiner* and *Reuter* with apparent approval and affirmed the dismissal finding the claim to be fairly debatable. Unfortunately, the court stated without authority "Whether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law." *Id.* at 662.

When read in context, the quoted language is clearly not intended to change existing law but merely to state the obvious that, where only the legal construction of the policy is involved, the question of whether defendant's position is reasonable should be decided as a matter of law. Indeed, the conclusion in

Wetherbee makes sense since the court found the policy provided no coverage, the failure to pay could not constitute bad faith.

Simply put, the circumstances in *Wetherbee* make it highly unlikely that the court intended to overrule prior law with merely a passing comment and with absolutely no authority or analysis. Further, when the decision is examined, it makes no sense that the court intended to change the law this drastically. While the decision is seven pages long, only two paragraphs were devoted to the bad-faith claim and only one sentence is devoted to the issue of who should decide the bad faith issue. Indeed, it was not even expressly addressed by the trial court.

The Court of Appeals, as required by the Erie Doctrine, considered and noted the apparent conflict and then resolved it stating:

> Although the statement in *Wetherbee* that whether a claim is fairly debatable is a question of law for the court to decide is inconsistent with statements in *Kiner* and *Nassen*, we do not believe the cases are irreconcilable. *Wetherbee* can be read as giving the trial court the opportunity to decide as a matter of law in the appropriate circumstances whether the insurer had a reasonable basis for denying the claim, but not mandating the court to do so. For example, the insurer in *Wetherbee* denied the insured's loss of consortium claim based on its interpretation of the governing policy and Iowa's underinsured motorist statute. 508 N.W.2d at 658-59. The trial court concluded that no coverage existed under the insurance policy, and thus, as a matter of law, the insurer could not be liable for bad faith. *Id.* at 661.

> The procedural posture of this case is more like that in *Kiner* and *Nassen*. In those cases, the parties disputed whether the insurer had a reasonable basis for denying the claim. Likewise, National Fidelity claimed to have made an honest mistake based on confusion, while Chadima painted a picture of an outright attempt to short change the estate by almost $50,000. Evidence supports both stories, creating a genuine issue of material fact as to whether National Fidelity had a reasonable basis for denying the claim.

Id. at 349.

The Court of Appeals then went on to clarify its reasoning by stating that the issue was nothing more than "the flip-side of whether the insured has met its burden of producing evidence that the insurer has no reasonable basis for denying the claim." *Id.* Indeed, the court noted that the cases relied upon by National Fidelity stand for nothing more than the proposition that Plaintiff failed to meet its burden in the particular case. *Id.* Here, however, Chadima had met his burden and the matter was properly submitted to the jury. The recent case of *Morgan v. American Family Mutual Insurance Co.*, 1995 W.L. 374784 (Iowa 1995) referred to by Petitioner is simply another example of this proposition. In *Morgan, citing Wetherbee*, without discussion the court simply finds the Plaintiff had failed to generate a jury issue on its bad faith claim.

Since the Court of Appeals properly applied Iowa law, there was no departure from established procedure let alone one significant enough to warrant granting further review.

IV.

THE COURT'S DECISION IN *SALVE REGINA COLLEGE V. RUSSELL* DOES NOT CREATE COMPELLING REASONS FOR CERTIORARI IN THIS CASE.

Petitioner argues that when this Court in *Salve Regina College v. Russell*, 499 U.S. 225 (1991) abrogated the rule that an appellate court should give deference to a trial court's interpretation of state law somehow opened upon a pandoras box of new cases which are appropriate for certiorari.

Frankly, Respondent does not understand this argument. Rule 10 by its terms is not conclusive but rather illustrative of the issues important enough to warrant granting certiorari and the resultant commitment of this court's limited resources. Respondent does not contend that the court has no power to grant certiorari here but only that it should not do so here since only an interpretation of Iowa law is involved.

In addition, this argument seems to be nothing more than a rehash of the argument made above. Again, the Petitioner predicates its argument on the premise that the Court of Appeals deviated from established law and created new law in this case or in some way acted unreasonably. As discussed above, this is simply not the case here. Even the district court recognized that this is a close issue with valid arguments on both sides. *See Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1433 n.17 (S.D. Iowa 1994). Further, as the Court of Appeals so aptly recognized, the question is really nothing more than whether Plaintiff has carried its burden of proof in any given situation. *Chadima v. National Fidelity Life Ins. Co.*, 55 F.3d 345, 349 (8th Cir. 1995). Likewise, Petitioner's suggestion that if this Court does not grant certiorari it should certify the question to the

Iowa Supreme Court is both belated and without authority. Petitioner has cited no authority for the proposition that this Court has the authority to deny certiorari and order certification at the same time.

In addition, the request is untimely. It was Petitioner who removed this case to federal court in the first instance therefore they have less standing to request certification. Likewise, Petitioner has never sought certification. Indeed, when Chadima sought certification in the Court of Appeals, Petitioner made no attempt to join in the request. In other words, Petitioner was content to have the Court of Appeals decide the issue until it ruled against it and only then did certification become attractive as a way of securing a second bite of the apple. This tactic has repeatedly been rejected by the courts. *See, e.g., Perkins v. Clarke Equip. Co.*, 823 F.2d 207, 209 (8th Cir. 1987) (practice of requesting certification after adverse judgment has been entered should be discouraged); *Complaint of McLinn*, 244 F.2d 677, 681 (5th Cir. 1984) (party should not be allowed a second chance at victory after district court has decided the issue).

V.

THE QUESTION PRESENTED WILL NOT HAVE A MAJOR IMPACT ON THE INSURANCE INDUSTRY, INSURANCE CONSUMER, AND THE JUDICIAL PROCESS.

Since the question presented is a narrow one of Iowa law which could be modified or changed either by the Iowa courts or the Iowa legislature the decision is not likely have the major impact which petitioner ascribes to it. This is not a case where the court can mandate a uniform rule. Rather, each state including Iowa will be free to make its own decisions in this area.

Since, as discussed above, the decision of the Court of Appeals is nothing more than a holding that Chadima met his burden of proof under these unique facts, the flood gate argument is without merit. The issue is one which is unlikely to reoccur with any real frequency since it does not arise in all bad faith cases. As noted above, a significant number of cases arise from the denial of claims based upon legal interpretations of the policy. These cases are clearly for the court. Likewise, not all cases where the claim is denied on factual grounds will be effected since the ultimate question in these cases is whether the plaintiff has met his/her burden of proof on the issue.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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